IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTLY, individually and on behalf of her minor, dependent child, KEVIN OTLY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JANIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

-against-

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES F. SMITH, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 14, 1974.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, which by a two to one vote reversed the judgments of the district courts, is not yet reported. The majority and dissenting opinions of the Court of Appeals appear in the Appendix at A. 3-30.* The Court of Appeals decision determined consolidated appeals from the United States District Courts for the Southern and Eastern Districts of New York. The decision of the United States District Court for the Southern District of New York is reported as Hurley v. Van Lare, 365 F.Supp. 186 (S.D.N.Y. 1973)(A. 31). The memorandum decision of the Eastern District "adopted" the decision in the Hurley action, and is not reported. It appears in the Appendix at A. 56.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 14, 1974. A timely petition for rehearing en banc was denied by the Court of Appeals on June 18, 1974, with two Judges dissenting. (A. 1-2). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Do New York's public assistance regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving Aid to Needy Families With Dependent Children assistance solely because of the presence of a non-legally responsible person in the home, violate the Social Security Act and implementing regulations of the Department of Health, Education and Welfare, as construed by this Court's decisions in King v. Smith and Lewis v. Martin?

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* References to the Appendix are referred to as A. ___.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Federal Provisions

42 U.S.C. §602(a)(7) provides "that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children...."

42 U.S.C. §606(a) defines dependent child in relevant part as one "who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent..."

45 C.F.R. §233.20(a)(3)(ii) provides that a State Plan for Aid to Needy Families With Dependent Children assistance must "Provide that, in establishing financial eligibility and the amount of the assistance payment: ... (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered...." The text of this provision appears in the Appendix at A. 64.

45 C.F.R. §233.90(a) provides in relevant part that "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph [i.e., a legally responsible relative] is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered...."

The entire text of 45 C.F.R. §233.90(a) appears in the Appendix at A. 64.

New York State Provisions

REGULATIONS OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

18 NYCRR §352.31(a)(3) provides in relevant part:

> "When a female applicant or recipient is living with a man to whom she is not married...his available income and resources shall be applied in accordance with the following:
> ...
>
> "(IV) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with Section 352.30(d)."

18 NYCRR §352.30(d) provides:

> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger.... In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating shall be a pro-rata share of the regular shelter allowance."

The full text of these state regulations appears in the Appendix at A. 65-66.

STATEMENT OF THE CASE.

The decision of the United States Court of Appeals for the Second Circuit reversed judgments of United States District Courts of the Southern and Eastern Districts of New York in favor of petitioners and the class of persons they represent.

Each of the petitioners and their children are recipients of public assistance pursuant to the Aid to Needy Families With Dependent Children program. 42 U.S.C. §601 et seq.; N.Y. Social Services Law, §§343 et seq. New York, and every other state, participates in this program. Respondents are officials charged with the administration of New York's public assistance programs.

New York provides, as do 49 of the 50 states, a separate public assistance allowance for shelter.* Pursuant to State regulation, each social services district in New York has established a schedule of maximum rents for the number of eligible persons in the home. [18 NYCRR §352.3(a)]. Petitioners challenge New York regulations which provide that when a person, who is not legally responsible to support the AFDC family, and is not a recipient of public assistance, resides in the AFDC household and does not contribute at least $15 per month, "the family's shelter allowance including fuel for heating shall be a pro rata share of the regular shelter allowance." [18 NYCRR §352.30(d)]. The regulations term this non-legally responsible person a "lodger." 18 NYCRR §352.30(d).

* See, Boucher v. Minter, 349 F.Supp. 1240, 1242 fn. 2 (D. Mass. 1972); Croff v. Mohlenruth, 328 F.Supp. 1016, 1020 (E.D. Pa. 1971).

Under these regulations, the family's rental allowance is reduced even though the non-legally responsible person does not contribute to the family's shelter expense, even though he or she is unable to make such a contribution, and even though his or her presence in the home does not increase the family's rental expense. In sum, the grant is reduced despite the fact that the AFDC family remains unchanged in law and in fact.* Petitioners claim that the State regulations are invalid under the Supremacy Clause because they conflict with the Social Security Act and implementing regulations of the Department of Health, Education and Welfare as construed by this Court in King v. Smith, 392 U.S. 309 (1968) and Lewis v. Martin, 397 U.S. 552 (1970).

Petitioner Charlotte Otey resides with her thirteen year old son. They are recipients of AFDC assistance. Prior to October 1972, petitioner Otey received the maximum shelter allowance for a family of two, or $145. This was sufficient to pay petitioner's actual rental of $145. However, when petitioner's adult son, Michael Otey, returned to live with petitioner in October, 1972, respondents reduced petitioner's shelter allowance pursuant to the challenged regulations to 2/3 of $145 or $96.65. Michael Otey resided with petitioner from October, 1972 until February, 1974. Michael Otey has no legal obligation to support the Otey family. In fact he made no financial contribution and paid no part of the rent. His presence in the home did not increase the family's rental expense.

Petitioner Rose Hurley resides with her three minor children. They are recipients of AFDC assistance. During

* See, Boucher v. Minter, 349 F.Supp. 1240, 1244 (D. Mass. 1972).

November and December, 1970, and January and February, 1971, a male friend of petitioner Hurley resided with the Hurley family. This friend had no legal obligation to support the Hurley family and in fact made no financial contribution and paid no part of the rent. His presence in the home did not increase the family's rental expense. Prior to his presence in the home, petitioners received a shelter allowance of $150 per month, which is less than the maximum allowable for a family of four. However, because of respondents' enforcement of the challenged regulations, petitioner Hurley's rental allowance was reduced by $30 to $120 per month. Petitioner desires to have her male friend reside with her, but fears that if he does, the family's shelter allowance will be reduced, as it was in the past, because of the enforcement of the challenged regulations.*

Petitioner Annie Taylor resides with her six year old child. They are recipients of AFDC assistance. Residing with them is petitioner's disabled sister.** Petitioner Taylor is obligated to pay a rental of $180 per month pursuant to a lease entered into between petitioner and her landlord. During January and February, 1973, petitioner Taylor received a shelter allowance pursuant to the challenged regulations equal to two-

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* Respondent Van Lare's Decision After Fair Hearing upholding the reduction in petitioner Hurley's grant appears at A. 61.

** Prior to January and February, 1973, this sister was a recipient of assistance pursuant to New York's Home Relief program. However, she received no assistance during January and February, 1973.

thirds of the maximum shelter allowance for a family of three persons ($165), or $110. Respondents turned down petitioner's request for a shelter allowance equal to the maximum for a family of two, or $145. Solely because of the presence of petitioner Taylor's sister in the household, petitioner has received a reduced shelter allowance.*

Each of the petitioners found it necessary to meet their rental obligation from the basic needs grants for food and clothing, or fell behind in the rent and were threatened with eviction.

The named petitioners' factual situations are typical of the thousands of AFDC families throughout New York who are adversely affected by the challenged regulations. Respondent Lavine estimates "that the total number of AFDC families residing in New York State who have had their grants of public assistance reduced pursuant to 18 NYCRR §352.30(d) is over 10,000" per year.** In addition, "(t)here are [presently] approximately 26,900 AFDC cases in the state of New York in which there is a non-legally responsible person residing in the household who is not receiving public assistance... ."***

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* Respondent Lavine's Decision After Fair Hearing upholding the reduction of petitioner Taylor's grant appears in the Appendix at A. 63.

** Respondent Lavine's Answers to Plaintiffs' Interrogatories, p. 1.

*** Defendant Lavine's Answer to Interrogatories, p. 2

Petitioner Rose Hurley commenced a class action pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), in the United States District Court for the Southern District of New York on August 11, 1972. She claimed that the challenged regulations violated the federal Social Security Act, the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the rights of privacy and association. Petitioners Taylor and Otey commenced a similar class action in the District Court for the Eastern District of New York on May 16, 1973.

By decision dated October 3, 1973, the District Court (Honorable Arnold Bauman) in the Hurley action held: (1) that the due process claim was substantial, thereby conferring subject matter jurisdiction on the Court pursuant to 28 U.S.C. §1343(3); (2) that it was proper to exercise pendent jurisdiction over the statutory claim; (3) that the challenged State regulations were invalid because they conflicted with the Social Security Act and its implementing regulations, particularly 45 C.F.R. §233.90, as construed by this Court's decisions in King v. Smith, supra and Lewis v. Martin, supra, because they impermissibly conclusively assume that the non-legally responsible person is contributing towards the family's shelter expense; and (4) that the action is a proper class action.* The court found that the harm caused to the needy and dependent children by the challenged regulations was "devastating" and issued declaratory and injunctive relief against their enforcement on behalf of the class.**

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* Two motions to intervene as parties plaintiffs were denied as unnecessary since "the proposed intervenors fall within a class action designation." (A. 46).

** Because the court ruled in petitioners' favor on the statutory claim, it was unnecessary to convene a three-judge court to hear the constitutional claims. Hagans v. Lavine, ___U.S.___, 94 S.Ct.1372 (1974).

In the Taylor action the District Court (Honorable Jack B. Weinstein) on October 10, 1973 found the opinion in the Hurley action "convincing" and "adopted" its "reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief...." (A. 59).

Respondent State Commissioner Lavine appealed from the judgments of the District Courts to the United States Court of Appeals for the Second Circuit. The actions were consolidated on appeal sub nom. Taylor v. Lavine. On May 14, 1974, the Court of Appeals, by a two to one vote, reversed the judgments of the District Courts. Taylor v. Lavine, ___F.2d___ (2d Cir. 1974). (A. 3). The Court of Appeals found the constitutional claims substantial, and remanded them to the District Courts for the convening of a three-judge court.*

The majority of the Court of Appeals (Judges Hays and Friendly) held that the challenged regulations do not violate the Social Security Act as construed in King and Lewis because they do not presume that the non-legally responsible person, is paying his or her share of the rent, but rather "are based on the fair inference from the presence of the lodger in the household that the AFDC recipient family actually needs less space for its own use than it is paying rent for... . They merely prevent non-eligible persons from benefiting from free living space." (A. 16-17).

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* On remand, a consolidated three-judge court was convened and a hearing was held on the constitutional claims before the three-judge court on June 26, 1974. No decision was rendered by the three-judge court by the date this petition was filed.

Judge Oakes, dissenting, found that the majority decision "disregards the mandates of Supreme Court decisions from King v. Smith, 392 U.S. 309 (1968), to Shea v. Vialpando, 42 USLW 4559 (U.S. April 23, 1974). As such, today's majority opinion stands nakedly - and thankfully - alone... .The result ...flies in the teeth of the federal law and Supreme Court decisions, disregards economic realities and is quite unjust to the needy children otherwise entitled to assistance." (A. 18). Judge Oakes found that the majority substituted a concededly impermissible conclusive presumption of support with "a conclusive presumption that whenever there is a 'lodger' the family has more space than it needs. As such, it may well be contrary to fact: the older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch." (A. 24) (emphasis in original).

On June 18, 1974, the Court of Appeals denied petitioners' petition for rehearing en banc. (A.1-2). Two Judges dissented from the denial of en banc review. (A. 2).

REASONS FOR GRANTING THE WRIT

I. THE MAJORITY DECISION BELOW, IN UPHOLDING NEW YORK'S RIGHT TO REDUCE THE AFDC FAMILY'S SHELTER ALLOWANCE SOLELY BECAUSE OF THE PRESENCE OF A NON-LEGALLY RESPONSIBLE PERSON IN THE AFDC HOUSEHOLD, CONFLICTS WITH THIS COURT'S DECISIONS IN KING V. SMITH AND LEWIS V. MARTIN.

Under the challenged regulations, the AFDC family's shelter allowance is reduced solely because of the presence of a non-legally responsible person in the home. The grant is reduced despite the fact that this person (a) has no obligation to support the AFDC family, (b) does not in fact contribute such support or is even unable to make a contribution, and (c) even though his or her presence does not increase the family's rental expense. The majority decision below directly conflicts with the Social Security Act and implementing Department of Health, Education and Welfare (H.E.W.) regulations as construed by this Court in King v. Smith, 392 U.S. 309 (1968) and Lewis v. Martin, 397 U.S. 552 (1970). See also, Shea v. Vialpando, ___U.S.___, 94 S.Ct. 1746 (1974).* The essence of King and Lewis is that the states, in evaluating resources to determine the amount of AFDC benefits a family is entitled to, must consider a family's actual resources on a case by case basis, and may not terminate or reduce AFDC assistance solely because of the presence of a non-legally responsible person in the home.

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* The states, as a condition to receiving the substantial federal funds under the AFDC program, must comply with the provisions of the Social Security Act and its implementing regulations. Shea v. Vialpando, supra; Carleson v. Remillard, 406 U.S. 598 (1971); Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, supra.

In King v. Smith, supra, this Court held that a state may not disqualify needy and dependent children from AFDC eligibility solely because of the presence in the home of a so-called "substitute father" who has no legal obligation to support the children and who in fact provides no support. Because the purpose of the AFDC program is to protect and benefit needy and dependent children, "the only kind of 'parent' under [42 U.S.C. §606(a)], whose presence in the home would provide adequate economic protection for a dependent child, is one who is legally obligated to support him." King v. Smith, supra at 332.* To the extent that New York State reduces the AFDC grant because of the presence of a non-legally responsible person in the home, it violates the clear meaning and intent of King. The New York "lodger" rule is the pro tanto equivalent of Alabama's "substitute father" rule struck down in King. See, King v. Smith, supra at 329. See, Dissenting Opinion below, pp.3481-3482 (A. 19-20).

As a result of this Court's decision in King, H.E.W. promulgated regulations providing that the inclusion in the home of a non-legally responsible person

> "is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In assuming financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered... ." 45 C.F.R. §233.90(a). Lewis v. Martin, supra at 555.**

In upholding the validity of this H.E.W. regulation, this Court in Lewis made it clear that the states may not presume the availability of income and terminate or reduce the AFDC grant because a non-legally responsible person is present in the home, whether that person be a relative or non-relative. The majority decision below thus allows New York to do precisely what King and Lewis forbid - reduce the AFDC grant to the detriment of thousands of needy and dependent children solely because of the presence of a non-legally responsible person in the home.*

In Shea v. Vialpando, supra, this Court reaffirmed that the heart of King and Lewis is the requirement that the state's make individualized determinations so "that the amount of assistance actually paid is based on the amount needed in the individual case... ." Shea v. Vialpando, 94 S.Ct. supra at 1754. (Emphasis in original). New York's inflexible policy fails to consider each family's needs and available income and thus runs counter to Shea.

The majority decision below upheld the challenged regulations on the ground that they "are based on the fair inference from the presence of the lodger in the household that the AFDC recipient - family actually needs less space... ."** The majority decision below has created a conclusive presumption of excess space that has exactly the same effect as the presumption of available income forbidden by King and Lewis. See, Owens v. Parham, 350 F.Supp. 598, 604 (N.D. Ga. 1972).

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* The federal Act defines "dependent child" as one "who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent... ." [42 U.S.C. §606(a)].

** This regulation is an interpretation of 42 U.S.C. §602(a)(7) which provides that in determining need, the state shall "take into consideration any other income and resources of any child or relative claiming aid to families with dependent children... ." Lewis v. Martin, supra at 555-556; King v. Smith, supra at 319 fn. 10.

* This Court has stated that "[t]he presence of the parent in the home who has the legal obligation of support is the key to the AFDC program." Carleson v. Remillard, supra at 603.

** The State did not offer the fair inference of excess space as a justification for the challenged regulations either in the district courts or in the court below. See, Dissenting Opinion Below, p. 3485. (A. 23).

Solely from the "lodger's" presence in the home, the majority below conclusively presumes (a) that the AFDC family has excess space and (b) that the "lodger" is paying for this space. Both presumptions may, of course, be contrary to fact: "the older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch." (Dissenting opinion below, p. 3486)(A. 24).*

Moreover, the conclusive presumption of excess space leaves the result unchanged - an identical reduction in the grant solely because of the presence of a non-legally responsible person in the home based on presumed but not actual facts. This is clearly forbidden by King and Lewis.

This Petition for a Writ of Certiorari should be granted to prevent harm to the thousands of needy and dependent children in New York who are being severely injured in a manner that directly conflicts with this Court's King, Lewis and Shea decisions.

II. THE MAJORITY DECISION BELOW CONFLICTS WITH ALL FEDERAL COURT AND STATE APPELLATE COURT DECISIONS IN POINT

The majority decision below directly conflicts with all of the federal district court and state appellate court decisions which have determined the issue presented in this case. Roselli v. Affleck, 373 F.Supp. 36, 46-47 (D.R.I. 1973) (Pettine, C.J.); Mothers and Childrens Rights Organization v. Stanton, 371 F.Supp. 298 (N.D. Ind. 1973); Owens v. Parham, 350 F.Supp. 598 (M.D. Ga. 1972)(three-judge court); Boucher

* Indeed, at the hearing before the three-judge court on remand, defendant Lavine's own agent testified that "if someone else ceases to live with you, this is not to say that before you had too much space."

v. Minter, 349 F.Supp. 1240 (D. Mass. 1972)(three-judge court); Jenkins v. Georges, 312 F.Supp. 289 (W.D. Pa. 1969)(three-judge court); Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362 (1974), cert. denied, ___U.S.___, 42 USLW 3679 (No. 73-1571 June 10, 1974); Matter of Battle v. Lavine, 44 App.Div.2d 307, 354 N.Y.Supp.2d 680 (2d Dept. 1974)- In every one of these cases, state regulations similar to those challenged herein were invalidated on the basis of this Court's decisions in King and Lewis.*

Indeed, this Court's very recent denial of certiorari in Hausman leaves standing a unanimous decision of the highest state court of New Jersey, New York's sister state, holding invalid a regulation virtually identical to the New York regulations upheld by the majority below. Hausman v. Department of of Institutions, supra.

The dissenting opinion below stressed the fact that the majority opinion "stands nakedly...alone" and in sharp conflict with all other federal court and state appellate court decisions in point:

* For other decisions holding invalid state AFDC provisions which work a reduction or termination of the grant solely because of the presence of a non-legally responsible person in the home, see, Rodriguez v. Vowell, 472 F.2d 622 (5th Cir. 1972); Reyna v. Vowell, 470 F.2d 494 (5th Cir.) aff'd, 409 U.S. 809 (1972); Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972); Gaither v. Sterrett, 346 F.Supp. 1095 (N.D. Ind.)(three-judge court), aff'd, 409 U.S. 1070 (1972); X v. McCorkle, 333 F.Supp. 1109, 1118 (D.N.J. 1970), aff'd sub nom. Engleman v. Amos, 404 U.S. 23 (1971); Gilliard v. Craig, 331 F.Supp. 587 (W.D. N.C. 1971), aff'd, 409 U.S. 807 (1972); Ojeda v. Mackney, 319 F.Supp. 149 (N.D. Tex. 1970); Grubb v. Sterrett, 315 F.Supp. 990 (N.D. Ind. 1970)(three-judge court); Soloman v. Shapiro, 300 F.Supp. 409 (D. Conn. 1969), aff'd, 396 U.S. 25 (1969). But see, Bullea v. Ott, 316 F.Supp. 1273 (D. Mass. 1970)(dicta).

> "The majority decision today reverses two distinguished federal trial judges and reaches a conclusion quite contrary to that of an Appellate Division of the New York Supreme Court, and antithetical to decisions of the Supreme Court of New Jersey, and of federal district courts in Massachusetts, Indiana and Georgia. (footnote omitted). It also disregards the mandates of Supreme Court decisions from King v. Smith, 392 U.S. 309 (1968), to Shea v. Vialpando, 42 USLW 4559 (U.S. April 23, 1974). As such, today's majority opinion stands nakedly - and thankfully - alone, for the majority opinion permits a state to deprive the dependent children of a needy family of a portion of their allowances for shelter because some person - whether an unemployed adult child, a disabled (but ineligible) sister, or a male 'friend' - resides in the same household. ...
> ...
>
> [B]y New York's cleverness in changing a 'parent' to a 'lodger', it has managed, with the aid of today's decision, to accomplish what a number of other states have not - the reduction in the AFDC child's benefits on the basis of the mother's living arrangements. (citations omitted)." Dissenting Opinion Below, pp. 3480, 3482 (A. 18, 20).

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the majority decision below and the federal court and state appellate court decisions which have reached a contrary result.

III. THIS CASE INVOLVES A SIGNIFICANT AND RECURRING QUESTION CONCERNING THE ADMINISTRATION OF THE AFDC PROGRAM THAT HAS NEVER BEEN PASSED UPON BY THIS COURT.

While petitioners strongly urge that the majority decision below conflicts with this Court's decisions in King and Lewis (Point I, supra) and with all other decisions in

point (Point II, supra), the precise question involved has never been passed upon by this Court. The question presented for review is of "broad importance" [Hausman v. Department of Institutions and Agencies, 314 A.2d supra at 365.] that effects thousands of needy and dependent children in New York and throughout the nation.* It has been the subject of a great deal of lower court litigation. See Point II, supra.

Respondents estimate that over 10,000 families in New York have received reduced grants of assistance pursuant to the challenged regulations each year, and that "(t)here are approximately 26,900 AFDC cases in the state of New York in which there is a non-legally responsible person residing in the household who is not receiving public assistance... ."** These estimates are probably conservative in view of the fact that in New Jersey, a state with a much smaller population than New York, approximately 47,900 families received a reduced amount of AFDC assistance because of the enforcement of a similar pro-rata regulation prior to its invalidation by the New Jersey Supreme Court. Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362, 366 (1974). And, as

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* Like this Court's decision in United States Department Agriculture v. Moreno, 413 U.S. 528 (1973), "(t)his case involves desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance... . [The challenged regulations penalize] the poorest of the poor for doubling up against the adversities of poverty." Id. 37 L.Ed2d supra at 793 (Justice Douglas, concurring).

** Defendant Lavine's Answers to Interrogatories.

a result of Alabama's adoption of its substitute father regulation subsequently held invalid by this Court in King, the total number of AFDC recipients in that State declined by about 20,000 persons, and the number of children recipients by about 16,000. King v. Smith, supra at 315.

Despite this Court's decisions in King and Lewis, regulations similar to New York's "lodger" regulations exist in many states. Lower court cases indicate that a number of states including California,* Georgia [Owens v. Parham, supra], Indiana [Mothers and Childrens Rights Organization v. Stanton, supra], Massachusetts [Boucher v. Minter, supra], New Jersey [Hausman v. Department of Institutions, supra]. Pennsylvania** and Rhode Island [Roselli v. Affleck, supra]/ In addition, similar provisions exist in Texas*** and Minnesota****.

have similar regulations.

---

* See, Russell v. Carleson, 36 Cal.3d 334, 111 Cal.Rptr. 497 (Cal. Ct.App. 1973). The California rule operates against the "man-in-the-house", rather than against the AFDC family. A similar rule exists in Oregon. Oregon P.W.D. Staff Manual, Manual Letter #11-414 Vol. II. Section 2145.46.

** See, Watson v. Department of Public Welfare, 293 A.2d 133 6 Pa. Super 54 (Pa. Super. Ct. 1972); Coffee v. Department of Public Welfare, 291 A.2d 549, 5 Pa. Super. 503 (Pa. Super.Ct. 1972).

*** Texas State Department of Public Welfare, Financial Services Handbook 3141.2 and 3141.3 (November, 1972), challenged in Houston Welfare Rights Organization v. Vowell, C.A. No. 73-H-296, S.D. Tex., Filed April 7, 1974.

**** See, Nelson v. Likins, No. 4-74-236 D. Minn. filed May 15, 1974, noted in 8 Clearinghouse Review 225-226 (July, 1974).

The harm caused by the challenged New York regulations was characterized by the district court in the Hurley action as "devastating":

> "[T]he inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33 1/3 percent. This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend alloted for food and clothing." (A. 44).

This Petition for a Writ of Certiorari should be granted because the case involves an extremely important question regarding the administration of the AFDC program that has never been passed upon by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: August 1, 1974
White Plains, New York.

Respectfully Submitted,

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APPENDIX

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of June , one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY,

HON. PAUL R. HAYS,

HON. JAMES L. OAKES,

Circuit Judges.

Docket Nos. 73-2671
73-2731

ANNIE TAYLOR, et al.,
Plaintiffs-Appellees,
v.
ABE LAVINE, et al.,
Defendants-Appellants.

ROSE HURLEY, et al.,
Plaintiffs-Appellees,
v.
BARRY VAN LARE, et al.,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Appendix "A-1"

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Rec'd 6/20/74

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of June, one thousand nine hundred and seventy-four.

ANNIE TAYLOR, et al.,
Plaintiffs-Appellees,
v.
ABE LAVINE, et al.,
Defendants-Appellants.

ROSE HURLEY, et al.,
Plaintiffs-Appellees,
v.
BARRY VAN LARE, et al.,
Defendants-Appellants.

Docket Nos. 73-2671
73-2731

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judges Feinberg and Oakes dissent.

Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 669 & 701—September Term, 1973.

(Argued December 21, 1973 Decided May 14, 1974.)

Docket Nos. 73-2731
73-2671

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees,

v.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants.

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Appellees,

v.

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually, and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P.

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KURTIS, individually, and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants.

Before:

FRIENDLY, HAYS and OAKES,

Circuit Judges.

Appeals from orders entered in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, and the United States District Court for the Southern District of New York, Arnold Bauman, *Judge*, enjoining appellants from enforcing the New York Department of Social Services Regulations, 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv), and declaring those regulations contrary to 45 C.F.R. § 233.90(a).

Reversed and remanded.

MARTIN A. SCHWARTZ, The Legal Aid Society of Westchester County, White Plains, New York (Leonard S. Clark, Nassau County Law Services Committee, Inc., Hempstead, New York, on the brief; Lawrence S. Kahn, The Legal Aid Society of Westchester County, White Plains, New York, of counsel), *for Appellees.*

JUDITH A. GORDON, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief, Constance M. Margolin, Assistant Attorney General, of counsel), *for Appellants.*

HAYS, *Circuit Judge:*

This court is again called upon to pass on a challenge to New York's administration of its program for state Aid to Families with Dependent Children (AFDC).

The federal AFDC program found in sections 401 to 444 of the Social Security Act of 1935, as amended, 42 U.S.C. §§ 601-644 (1970), provides financial aid to states on a matching funds basis to assist the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . .", 42 U.S.C. § 606(a) (1970). Each state wishing to qualify for sums appropriated by Congress must submit a plan for "aid and services to needy families with children," 42 U.S.C. § 601 (1970). The plan must contain each provision on the list set forth in section 402(a) of the Social Security Act and must be approved by the Secretary of Health, Education and Welfare. 42 U.S.C. § 602(b) (1970). Among the requirements found in section 402(a) are that the state plan furnish aid "with reasonable promptness to all eligible individuals," 42 U.S.C. § 602(a)(10) (1970), and that the state agency in determining need "take into consideration any other income and resources of any child or relative claiming aid to families with dependent children." 42 U.S.C. § 602(a)(7) (1970). New York has submitted such a plan and from time to time amended it. The plan and amendments have been approved by the Secretary.

Among the New York regulations under which AFDC funds are distributed are 18 N.Y.C.R.R. § 352.30(d), which reduces the maximum shelter allowance available to a recipient family pro rata to the extent that there are non-eligible lodgers living in the household, and 18 N.Y.C.R.R. § 352.31(a)(3)(iv), which treats a man living with a female recipient but not married to her as a "lodger." Plain-

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tiffs Hurley, Taylor and Otey challenged these regulations in separate actions in two federal district courts as creating a conclusive presumption offensive to due process, as denying them the equal protection of the laws, and as invading their rights to privacy and free association. They also claimed that the regulations are in effect "substitute parent" regulations forbidden for state plans by section 406(a) of the Social Security Act and 45 C.F.R. § 233.90(a) (1973). The single district judge upheld the statutory claims and thus found it unnecessary to consider whether a court of three judges should be convened under 28 U.S.C. § 2281.

The New York regulations in question provide as follows:

> "When a female applicant or recipient is living with a man to whom she is not married . . . his available income and resources shall be applied in accordance with the following:
>
> • • •
>
> "(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)."[1] 18 N.Y.C.R.R. § 352.31(a)(3).
>
> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding

[1] In the version of 18 N.Y.C.R.R. before the district courts, 18 N.Y.C.R.R. § 352.31(a)(3)(iv) referred to section 352.30(e), rather than to section 352.30(d). The *Hurley* district court held that the reference was erroneous, that it should have been to section 352.30(d). —— F. Supp. —— at n.1. Appellants, state officials entrusted with administering the regulation, did not contest that determination. The text of section 352.31(a)(3)(iv) was amended effective April 2, 1973, to refer to section 352.30(d).

> lodger. . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance." 18 N.Y.C.R.R. § 352.30(d).

45 C.F.R. § 233.90(a)(1973) provides as follows:

> "A State plan under title IV-A of the Social Security Act [relating to the AFDC program] must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions."

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The district court in each of the two cases found the New York regulations offensive to the Social Security Act and 45 C.F.R. § 233.90(a), and accordingly granted declaratory and injunctive relief. We reverse and remand for the convening of a three-judge court to consider the constitutional issues raised by the appellees.

I.

The facts in both cases are uncontroverted.

A. *Hurley v. Van Lare.*

Appellee Rose Hurley lives with her three dependent children, aged ten, five and five years, in Mount Vernon, New York. She and her children have been living apart from her husband since 1967; she has had no contact with him since 1967 and does not know where he is. The Hurleys receive public assistance under the New York AFDC plan as it is administered by the Westchester County Department of Social Services.

During the four-month period from November 1970 to February 1971, an unrelated male friend of Mrs. Hurley stayed with her and her children at their Mount Vernon residence. The friend was under no legal obligation to support the Hurleys, and in fact he made no contribution to their support. His presence did not increase the amount of rent that Hurley was obliged to pay, $150.00 per month. During the same four-month period, the Westchester Department of Social Services deducted $35 per month from Hurley's recurring AFDC grant, presumably in accordance with 18 N.Y.C.R.R. § 352.30(d).

On November 12, 1970, Hurley requested a "Fair Hearing," a proceeding provided for in 18 N.Y.C.R.R. §§ 358.1-358.27, to review the reduction of her AFDC grant. A hearing was held on March 22, 1971, and on September 20, 1971, appellant Van Lare, the Acting State Commis-

sioner of the Department of Social Services, rendered a "Decision after Fair Hearing" in which he found the facts to be substantially as stated above. He upheld the determination of the Westchester County Department that Hurley's grant should be reduced, but diminished the amount of the reduction to $30.00.

Thereafter, on August 11, 1972, Hurley brought an action in the District Court for the Southern District of New York on behalf of herself and all others similarly affected by sections 352.31(a)(3)(iv) and 352.30(d) to secure declaratory relief, an injunction against enforcement of the regulations, and judgment for retroactive AFDC payments.

Defendants Van Lare and Lavine, appellants here, are respectively Acting Commissioner and Commissioner of the Department of Social Services of New York, and defendant Kurtis is Commissioner of Social Services for Westchester County.

Hurley based her demand for an injunction on the theory that she has not associated with her friend out of fear that her public assistance grant will be reduced, as it was in November 1970, by the enforcement of sections 352.31(a)(3)(iv) and 352.30(d). She contended that the regulations are offensive to the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that they are in violation of her rights of privacy and free association, and that they are invalid under sections 402 and 406 of the Social Security Act, 42 U.S.C. §§ 602, 606 (1970), and 45 C.F.R. § 233.90(a).

The district court did not convene a three-judge court under 28 U.S.C. § 2284 (1970) to consider the merits of the constitutional claims. See 28 U.S.C. § 2281 (1970). But the district court determined that at least the Due Process claim is sufficiently substantial to vest the court with sub-

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ject matter jurisdiction under 28 U.S.C. § 1343(3) (1970), and that under the doctrine of pendent subject matter jurisdiction it had the power to decide the statutory claim.

On Hurley's motion for summary judgment, the district court held that the New York regulations violate section 406 of the Social Security Act and 45 C.F.R. § 233.90(a), as interpreted by the Supreme Court in *King* v. *Smith*, 392 U.S. 309 (1968), and *Lewis* v. *Martin*, 397 U.S. 552 (1970):

> "[T]he inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33⅓%. This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.
>
> "The [New York] regulations thus conflict directly with § 233.90 . . . . Despite the defendants' protestations to the contrary, a *pro rata* reduction does indeed assume that the male lodger will pay his own way, whether or not he actually does. That is precisely the assumption found impermissible in *King* and *Lewis*." — F. Supp. at —.

In granting summary judgment, the district court gave declaratory relief and enjoined appellants from enforcing the challenged regulations, but denied Hurley's claim for retroactive welfare payments.[2] The district court also granted Hurley's motion that the action be designated a class action under Rule 23(c).

[2] The district courts properly denied retroactive payments, relying on our decision in *Rothstein* v. *Wyman*, 467 F.2d 226, 238 (2 Cir. 1972), cert. denied, 411 U.S. 951 (1973), which has recently been approved by the Supreme Court in *Edelman* v. *Jordan*, — U.S. —, 42 U.S.L.W. 4419, 4423 (Mar. 25, 1974).

The appellants have appealed the order granting the summary judgment and class action motions, and Hurley has appealed the denial of retroactive benefits.

B. *Taylor and Otey* v. *Lavine.*

Annie Taylor, her six-year-old child, and her sister, Virginia Taylor, live together in Freeport, Long Island. Annie Taylor and her child receive public assistance under the New York AFDC program as it is administered by the Nassau County Department of Social Services. Prior to January 1, 1973, the sister had received aid under the state home relief program, but after that date she received no public assistance. The sister is under no legal obligation to support Annie Taylor or her child, and she in fact makes no contribution to Taylor's $180 monthly rental.

Prior to January 1, 1973, the three Taylors were receiving $155 per month in shelter allowance, the maximum allowance available for a household of three persons according to a schedule issued by the Nassau County Department of Social Services. When the sister was dropped from the home relief program, Annie Taylor's shelter allowance was reduced to $110.00, two-thirds of $155, under 18 N.Y.C.R.R. § 352.30(d). Taylor requested the maximum shelter allowance for two persons, $145.00. Her request was denied. She demanded and received a "Fair Hearing" at which facts were found substantially in accordance with the foregoing statement. Because the diminished shelter allowance was not enough to pay her rent, Taylor fell behind in her rental payments and was eventually the subject of an eviction order.[3]

[3] The eviction order was nullified when Taylor paid her overdue rent out of the proceeds of her April 1973 grant, a grant increased to the pre-January 1, 1973, level because of the fact that her sister began to receive aid under the joint federal-state Aid to the Disabled Program on March 14, 1973. On the basis of the limited record before us we do

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Plaintiff Charlotte Otey and her thirteen-year-old son, like the Taylors, reside in Freeport, and are recipients of AFDC aid. When Otey's 23-year-old son, not a public assistance recipient, moved into the Otey apartment in October, 1972, Otey's shelter allowance was reduced from $145.00, the maximum allowance for two people, to $96.65, two-thirds of the maximum. Otey demanded an opportunity for a "Fair Hearing," which was granted, but she failed to appear.

Taylor and Otey brought an action in the Eastern District of New York, making claims similar to those asserted in *Hurley* v. *Van Lare*, and seeking similar relief, except that they did not contest the validity of 18 N.Y.C.R.R. § 352.31(a)(3)(iv). Defendant Shuart is Commissioner of the Department of Social Services of Nassau County. The district court granted the plaintiff's motion for summary judgment, and gave the declaratory and injunctive relief sought, adopting the *Hurley* district court's "reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief. . . ." It denied retroactive AFDC payments.

Lavine and Shuart appeal from the summary judgment.

II.

Without passing on the constitutional claims, we agree they are sufficiently substantial to support jurisdiction under the liberal test the Supreme Court has recently announced in *Goosby* v. *Osser*, 409 U.S. 512 (1973). Where the constitutional claim is sufficient to vest the district court with jurisdiction, it is proper for a single judge to decide the statutory question under pendent jurisdiction,

not decide whether Taylor's claim for declaratory and injunctive relief is moot. On remand, the district court should consider whether her claim presents a justiciable controversy. *See Hall* v. *Beals*, 396 U.S. 45, 48 (1969); *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969).

Hagans v. *Wyman*, — U.S. —, 42 U.S.L.W. 4381 (Mar. 25, 1974), and, if he sustains it, to defer requesting a three-judge court under 28 U.S.C. § 2281, pending review.

Hurley, Taylor and Otey base their claim that the New York regulations are contrary to federal law on two Supreme Court decisions: *King* v. *Smith*, 392 U.S. 309 (1968), and *Lewis* v. *Martin*, 397 U.S. 552 (1970). On careful consideration of these cases, it is clear that neither justifies the district courts' interference with New York's program for distributing AFDC grants.

In *King* v. *Smith*, 392 U.S. 309 (1970), Alabama AFDC recipients brought an action to enjoin enforcement of a state regulation which provided that "an 'able-bodied man, married or single, is considered a substitute father of all the children of the applicant . . . mother' . . . if 'he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation.'" 392 U.S. 313-14 (emphasis deleted). The effect of the regulation under Alabama law was to remove the family from the category of aid recipients created by section 406(a) of the Social Security Act: because of the presence of the "substitute father," Alabama presumed that there was no "continued absence . . . of a parent." 42 U.S.C. § 606(a)(1970). The Supreme Court held that the Alabama rule "defines 'parent' in a manner that is inconsistent with § 406(a) of the Social Security Act." 392 U.S. at 333. Reasoning that the purpose of the federal AFDC program is to protect and benefit needy and dependent children, the Court said that "the only kind of 'parent,' under § 406(a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him." 392 U.S. at 332.

Alabama asserted that two state governmental interests were advanced by the substitute father rule: the state's interest in discouraging meretricious sexual relationships,

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and the state's interest in allocating its share of AFDC funds according to the needs of its citizens. As to the first interest, the Supreme Court allowed that states generally have broad discretion in regulating sexual behavior outside of marriage, but held after examining the legislative history of the Social Security Act that Congress did not intend section 406(a) to be a lever in the hands of state legislators to compel compliance with local standards of moral conduct. 392 U.S. at 320-27. As to the second interest, the Court granted that Alabama had the power to set the level of benefits and standard of need under its plan, but held that in determining need it must account for the actual resources of the child. 392 U.S. at 332.

In one sense, the *King* holding does not bear directly on the instant case. Unlike the Alabama substitute father regulation, the New York regulation does not presume to define "parent" artificially to deny eligibility to the family housing a lodger. The meaning of the term "parent" as it used in section 406(a) is therefore not directly at issue. The New York regulation merely determines the level of payment to the eligible family on the basis of the presence or absence of a lodger in the recipient household. This method of computing shelter allowance is permitted under the *King* v. *Smith* rationale if it is not designed to vindicate a moral interest unrelated to the need of the family, and if it realistically determines the level of need. As to the first point, it is clear that there is not the punitive aspect to the New York regulation that there was in the Alabama substitute father regulation. This is not a case of New York trying to impose "middle class morality" on the welfare recipient, using AFDC as an instrument of social control. This fact is illustrated by the Otey and Taylor cases, cases in which the shelter allowances were reduced because of the presence of persons other than

the mother's paramour in the recipient household. The appellees' claim that sections 352.30(d) and 352.31(a)(3)(iv) offend the principle in *King* v. *Smith* thus stands or falls on their assertion that the regulations create a conclusive presumption of lodger contribution to the AFDC unit's rental expense, and that this presumption does not account for the actual needs of the AFDC-eligible family.

Under the long standing administrative interpretation of section 402(a)(7) of the Social Security Act, only real sources of income may be considered by the state in determining need. The most recent embodiment of that interpretation, section 233.90(a) of the Health, Education and Welfare regulations governing the content of state plans, clearly states that the presence of any individual except a person legally obliged to support the child "is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State." Any doubt remaining on the issue was removed by the Supreme Court's holding in *Lewis* v. *Martin*, 397 U.S. 552 (1970), that section 233.90(a) precluded California from attributing income to an AFDC-eligible child from a non-adopting stepfather who had no duty of support under state law.

Although we agree that federal law prohibits a conclusive presumption of support, we do not agree that the New York regulations here in question imply such a presumption. The regulations imply only that the lodger's presence evidences the recipient family's diminished need for housing space. Section 352.30(d) does not attribute a non-existent obligation of support to the lodger, nor does it deny the AFDC-recipient children or caretaker their share of the actual housing expenditures. Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC-eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance. In-

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deed, if a section 352.30(d) lodger can separately demonstrate his eligibility for public aid, the AFDC shelter allowance is increased to include his share, a principle illustrated by the Taylor case. See note 3, supra.

Appellees have attempted to justify their position by incanting the words "conclusive presumption of contribution." But it is clear that the New York regulations are based on the fair inference from the presence of the lodger in the household that the AFDC recipient family actually needs less space for its own use than it is paying rent for. Appellees do not dispute that in the event an eligible family chooses to live as lodgers in a portion of a non-eligible person's house, the state may pay only the eligible family's pro rata share of the total rent, regardless of contribution, without offending federal law: the recipient family would be due shelter allowance only for that portion of the house they were actually using. The outcome is no different when the AFDC family uses a portion of its own premises to house a non-eligible person, whether or not that person contributes to the rent.

Prorating housing expenses among recipients and non-recipients of public aid accounts for the economies of scale that are realized when individuals live in groups; per-individual housing costs decrease as the number of individuals living together increases. In the Hurley case, for example, Hurley, her three children, and her lodger can live at a lower per capita housing cost than can Hurley and her children alone. Thus, the New York scheme does not attribute a false duty of support or a false source of income, but rather accounts for the actual cost of housing to an AFDC-recipient family.[4]

[4] In preparing for these appeals, the New York Department of Social Services addressed a letter to the Regional Attorney of the Social and Rehabilitation Service of the Department of Health, Education & Welfare containing a request for an opinion on the following question:

"Is a state policy of prorating a shelter allowance so as to reflect the percentage of public assistance recipients residing in a household valid under 45 CFR 233.90?"

The response of the Regional Commissioner of the Department was available a short time after these appeals were argued:

". . . HEW has permitted states to prorate shelter allowances to reflect the percentage of public assistance recipients in a household. Such a proration is not considered an assumption of income, but rather a recognition that per-individual costs decrease as the number of individuals living together increases."

[5] In *Bottle* v. *Lavine*, —— App. Div. —— (2d Dep't April 22, 1974), the Appellate Division held that the regulation prorating shelter allowance violated 45 C.F.R. § 233.90. Solely on the authority of the district court's decision in *Hurley* v. *Van Lare*, it rejected the proposition that the purpose of the New York regulation is to prevent non-eligible persons from benefiting from shelter allowance payments. Since we reverse *Hurley* v. *Van Lare*, we do not give any weight to the Appellate Division's holding.

The New York regulations have a more limited objective than those held invalid in *Kings* and *Lewis*. The objective of section 352.30(d) is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it. Unlike the Alabama and California regulations, the New York regulations do not cut off all aid to families having non-eligible persons in their households. They merely prevent non-eligible persons from benefitting from free living space.[5] New York's interest in preventing non-eligible persons from sharing in AFDC benefits is coextensive with the federal interest in allocating AFDC appropriations only to eligible persons. Section 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10) (1970), states that aid *must* be furnished "with reasonable promptness to all eligible individuals," language necessarily implying that aid should *not* be furnished to non-eligible individuals.

Reversed and remanded.

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OAKES, *Circuit Judge* (dissenting):

The majority decision today reverses two distinguished federal trial judges and reaches a conclusion quite contrary to that of an Appellate Division of the New York Supreme Court, and antithetical to decisions of the Supreme Court of New Jersey, and of federal district courts in Massachusetts, Indiana and Georgia.[1] It also disregards the mandates of Supreme Court decisions from *King* v. *Smith*, 392 U.S. 309 (1968), to *Shea* v. *Vialpando*, 42 U.S.L.W. 4559 (U.S. Apr. 23, 1974). As such, today's majority opinion stands nakedly—and thankfully—alone, for the majority permits a state to deprive the dependent children of a needy family of a portion of their allowances for shelter because some person—whether an unemployed adult child, a disabled (but ineligible) sister, or a male "friend"—resides in the same household. The result I think flies in the teeth of the federal law and Supreme Court decisions, disregards economic realities and is quite unjust to the needy children otherwise entitled to assistance.

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1 *Battle* v. *Lavine*, —— App. Div. ——, —— N.Y.S.2d —— (2d Dep't Apr. 22, 1974). *Contrary to the majority's suggestion*, at note 5, the New York court's decision was not merely based on *the authority of Hurley* v. *Van Lare* One would be surprised were a high court of the sovereign state of New York to determine *the purpose of a state regulation* "[s]olely on the authority of [a federal] court's decision." Majority opinion at note 5. Rather *Hurley* v. *Van Lare* was simply cited for the proposition that the federal district court had reached one of the same conclusions as the Appellate Division—that "notwithstanding the [State's] protestations that their concern is that ineligibles not receive a rental stipend, the inevitable result of the State regulation under attack is to reduce, perhaps drastically, the stipend for those who are eligible." —— App. Div. at ——, —— N.Y.S.2d at ——. Other shelter allowance cases contrary to the majority decision include *Hammons* v. *Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362 (1974). *See also Mothers and Children's Rights Organization, Inc.* v. *Stanton*, 371 F. Supp. 298 (N.D. Ind. 1973); *Owens* v. *Parham*, 353 F. Supp. 598 (N.D. Ga. 1972) (three-judge court); *Boucher* v. *Minter*, 349 F. Supp. 1240 (D. Mass. 1972) (three-judge court), all of which are unmentioned by the majority opinion.

The majority today finds two challenged New York regulations in conformity with the federal statute, 42 U.S.C. § 602(a)(7),[1a] and regulation, 45 C.F.R. § 233.90(a)(1973).[2] The first challenged regulation, 18 NYCRR § 352.31(a)(3)(iv),[3] is New York's administrative soft

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1a 42 U.S.C. § 602 reads, in pertinent part:

> (a) A State plan for aid and services to needy families with children must . . .
>
> (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

2 45 C.F.R. § 233.90 *Factors specific to* APDC.

> (a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man in the house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

3 18 NYCRR § 352.31(a) . . .

> (3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient

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shoe around *King* v. *Smith*, *supra*. New York defines a man who lives with a woman to whom he is not married and for whom he does not assume financial responsibility as a "lodger." In *King*, Alabama had defined a man who engaged in the same conduct a "parent." In *King* the result of that definition was to disqualify the AFDC *child* from receiving any benefits; in the present case the result of New York's definition of the man as a "lodger" is also to disqualify the AFDC child, although only from a portion of his benefits. Thus by New York's cleverness in changing a "parent" to a "lodger," it has managed, with the aid of today's decision, to accomplish what a number of other states have not—the reduction in the AFDC child's benefits on the basis of the mother's living arrangements. *See*, e.g., *Lewis* v. *Martin*, 397 U.S. 552 (1970); *King* v. *Smith*, *supra*; *Rosen* v. *Hursi*, 464 F.2d 731 (8th Cir. 1972); *Reyna* v. *Vowell*, 470 F.2d 494 (5th Cir. 1972); *Boucher* v. *Minter*, 349 F. Supp. 1240 (D. Mass. 1972) (three-judge court); *Owens* v. *Parham*, 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court); *Gaither* v. *Sterrett*, 346 F. Supp. 1095 (N.D. Ind.) (three-judge court), *aff'd*, 402 U.S. 1070 (1972). At least one state has been frustrated twice, *see* *X* v. *McCorkle*, 333 F. Supp. 1109 (D.N.J. 1970), *aff'd sub nom. Engleman* v. *Amos*, 404 U.S. 23 (1971); *Hausman* v. *Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 302 (1974). And, interestingly, the majority, by not striking down this regulation, runs directly counter to its *own* assessment of what *King* stands for—"that Con-

basis, his available income and resources shall be applied in accordance with the following:

. . . .

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).

gress did not intend [AFDC] to be a lever in the hands of state legislators to compel compliance with local standards of moral conduct."

This determination may not be so harsh as it sounds, however, for it seems plain enough that the three-judge court should find this regulation unconstitutional. The definition of a "lodger" as a man who lives with a woman to whom he is not married, while not defining a woman who lives with a man as such, is so patently a violation of equal protection on the basis of sex, *see Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971), that, whether sex is regarded as a "suspect" classification or not, the State is unlikely to be able to find a justification for the classification here.

The other regulation under challenge here, 18 NYCRR § 352.30(d),[4] is the more significant—both because its cleverness makes it more insidious and because, even absent the other regulation defining "lodger," this regulation also permits the reduction of recipient children's benefits as a result of whom the mother allows to live in the house, the apartment or tenement as the case may be. This regulation provides that if a lodger pays $15 a month or more, that amount will be considered income to the recipient

[4] 18 NYCRR § 352.30(d):

A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

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family.[5] If, however, the lodger pays nothing, or less than $15, then a pro rata share of the shelter allowance, including fuel for heating, will be deducted from the *family's* benefits.[6] This is the regulation which resulted in plaintiff Taylor and her six-year-old child receiving an eviction notice because a reduced shelter allowance made it impossible to meet the rent. Plaintiff Taylor's "lodger"? Her disabled sister. This is the regulation which requires plaintiff Otey to throw her unemployed, ineligible-for-welfare, 23-year old son out on the street, because if he lives in the home their shelter allowance will not be sufficient to pay the rent, while if he moves out the State will pay the full amount.[7]

The majority concedes that if this regulation *conclusively presumed* the availability of income from the lodger and reduced the AFDC child's benefits on that basis, then the regulation would be unlawful under the HEW regulation.

5 This actual contribution, like all other income, will result in a reduction of the family's benefits under the theory that welfare will only provide that money necessary to bring a family up to its level of need. This section of the regulation is unchallenged and, in my view, comports entirely with the intent of the federal statute and regulations.

6 Those on welfare are sure to learn quickly that they will maximize their benefits by *claiming* that they receive $15 a month from their lodger, resulting in only a $15 diminution of their shelter allowance. In this way they will lose only $15 of benefits, rather than a pro rata share, which normally would be more. Thus, in Hurley's case the pro rata reduction was $35, although she received no contribution from her male friend. In Taylor's case the pro rata reduction was $15, although she received no contribution from her sister. In Otey's case the pro rata reduction was $44.33 although she received no contribution from her son. One may wonder about the rationality of a system which deducts $35 from someone receiving no contribution, but only $15 from someone receiving a $15 contribution.

7 Compare this result with the federal purpose "to help maintain and strengthen family life," 42 U.S.C. § 601, and the federal requirement that states provide services "for the purpose of preserving . . . the family . . . ." 42 U.S.C. §§ 606(a)(2), 606(a)(14), 606(b). *See Shea v. Vialpando*, 42 U.S.L.W. 4559, 4562 (U.S. Apr. 23, 1974). *See also Rodriguez v. Swoap*, 472 F.2d 637, 638 (9th Cir.), *cert. denied*, 412 U.S. 944 (1973).

Rather than find such a presumption inherent in the regulation, however, the majority advances two independent bases or objectives of the regulation as compatible with the federal law and regulation. Each of them is in my view wholly lacking in sufficiency.

The first allowable "basis" for the regulation found by the majority is "the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space for its own use than it is paying rent for." While "it is clear" to the majority that this inference is the basis of the regulation, this was not the basis claimed by the State either in the court below or in this court.[8] Rather this "basis" for the regulation lies in my colleagues' fertile imagination. If this case were here now upon an equal protection challenge, then the majority might properly try to find a reasonable basis for the classification. *Dandridge v. Williams*, 397 U.S. 471 (1970). But this is *not* an equal protection challenge. It is a challenge under a federal statute and regulation which through several years and many case of judicial scrutiny have taken on substantive requirements well beyond those of the Equal Protection Clause. Primary among those requirements is that *a child's resources are to be measured in actuality, not on the basis of a presumption. See, e.g., Shea v. Vialpando*, 42 U.S.L.W. 4559, 4562 (U.S. Apr. 23, 1974). The majority acknowledges the federal prohibition of a presumption of support. Support, however, is just *one* type of resource affecting a family's need; the amount of available living space is another. Yet in place of a presumption of support, the majority substi-

8 It would indeed be hard to maintain that this is the basis for the rule, because as soon as the "lodger" moves out, the full shelter allowance is restored. If the presence of the lodger demonstrates old excess space, as maintained by the majority, then his moving out would not be a reason to resume full shelter payments.

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tutes a *conclusive presumption that whenever there is a "lodger" the family has more space than it needs.* As such, it may well be contrary to fact: the older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch.

Labeling the New York regulation a "fair inference" does not change its conclusive nature where a showing contrary to the inference will not affect the shelter allowance reduction; here the only fact considered by the State in the fair hearing is the presence or absence of a lodger, not the amount of space in the apartment. If the regulation provided only for a rebuttable presumption, whether of payments by the lodger or of excess space, there might well be a *different* question.[9] Thus, the majority, in upholding the regulation on this basis, creates a conclusive presumption regarding the child's needs which has the effect of reducing the AFDC child's benefits. This directly contravenes the HEW regulation which provides:

> [A state plan must] [p]rovide that the determination of need and amount of assistance for all applicants

9 In *Mothers and Children's Rights Organization, Inc. v. Stanton*, —— F. Supp. ——, Civ. No. 72 F 69 (N.D. Ind. 1973), the court found regulations almost identical to New York State's in conflict with the federal law and regulations as applied. The court found that making a presumption of support, if rebuttable, was lawful, but if the presumption was irrebuttable in practice, then it was unlawful. *Accord, Hallman v. Department of Institutions and Agencies*, 64 N.J. 210, 314 A.2d 382 (1974). In *Quesa v. Parham*, 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court), the court also found a presumption in analytically identical regulations, upheld the regulations on their face, but found them unconstitutional as applied because recipients whose shelter allowances were reduced as a result of nonweighties residing in the household were not given an opportunity to rebut the presumption. The Supreme Court in *Shea v. Vialpando*, 42 U.S.L.W. at 4564, suggested a similar solution in finding a uniform allowance for work-related expenses unlawful under the Act. The Court said that if there were provided an opportunity for individualized consideration where the allowance was not sufficient, then the allowance would not be unlawful.

> and recipients will be made on an *objective and equitable basis* . . . .

45 C.F.R. § 233.20(a)(1) (emphasis added). The majority's conclusive presumption of the child's need, or lack of it, also violates what seems to me the clear import of *Shea* v. *Vialpando*, *supra*, *King* v. *Smith*, *supra*; *Lewis* v. *Martin*, *supra*; and HEW regulation, 45 C.F.R. § 233.20(a), that a family's resources (be they income or amount of living space) be determined by what it *actually* has or receives, not by presumptions or inferences.[10] If such a presumption be the basis for the New York regulation,[11]

10 In *Shea* v. *Vialpando*, *supra*, the Court declared a Colorado uniform allowance for work-related expenses incompatible with the Social Security Act, saying:

> From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the individual case after other income and resources are considered.

42 U.S.L.W. at 4562 (emphasis original).

11 New York's regulations requiring initial and continuing investigations into need and eligibility demonstrate both its general adherence to the *rule of determining actual, individual needs and resources* and the lack of necessity for a presumption regarding excess living space. The New York regulations deal in some detail with the investigations to be made both initially, 18 NYCRR §§ 351.1-.6, and on a continuing basis, 18 NYCRR §§ 351.20-.21. The actual resources are investigated in depth. 18 NYCRR § 351.2(c). Among the facts to be determined by documents, personal observation, personal and collateral interviews and other means are the residence and family composition. Each member of the household is investigated as to age, relationship to other members, marital status, employment, and the like. 18 NYCRR § 351.2(c). The place of residence must itself be specifically investigated and approved. 18 NYCRR § 351.3. Every six months all variable factors of need must be reconsidered, re-evaluated, and verified. 18 NYCRR § 351.21(b)(2). In short, it is absurd to create an administrative presumption concerning resources of income or space, when the actual information is on file and subject to immediate verification. Let it be remembered that New York justified its "home visits" in *Wyman* v. *James*, 400 U.S. 309 (1971), by its claimed need to gather this very type of information.

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it is in violation of federal law, and the regulation must fall."

An "objective" of the New York regulation, according to the majority, "is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it." Clearly the State is not required, or for that matter allowed, to extend AFDC benefits to ineligible persons. The question, however, is whether this regulation serves to keep AFDC benefits from the ineligible, or whether instead it unlawfully withholds benefits from those rightfully entitled to it—dependent children in need and their responsible families. The fallacy underlying the majority's view, and the argument of the State on this issue, is that the lodger is not a "beneficiary" of the AFDC grant either in law or fact. The lodger is rather the beneficiary of the AFDC family's generosity, and more likely that of the AFDC children's mother. If a lodger is not present in the household, the family receives a rent allowance determined by the State to be proper for the family. If a lodger then is invited into the household, he would not receive any benefit from the AFDC grant, the entire amount of which the family is entitled to without him; he is rather a recipient of that charity which the family wishes to extend *from its own resources*.[12] He is there at the family's for-

12 This conclusive presumption, which the majority styles a fair inference, is in any case in violation of due process. *See* Quong v. Parham, *supra*. *See also United States Department of Agriculture v. Moreno*, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. *Illinois*, 405 U.S. 645 (1972); *Bell* v. Burson, 402 U.S. 535 (1971).

13 To carry out the majority's analysis, when the welfare mother puts a dollar bill in the collection plate on Sunday, the church is "sharing in AFDC benefits," and presumably the majority would uphold a state regulation which provided for withholding from the AFDC grant a sum equal to any donations to charity. The supposed justification remains the same—the State provides AFDC grants for the support of the dependent child and not for the benefit of ineligibles, and the fallacy is the same. Rather the State provides the family with what it deter-

bearance or pleasure and he has no right to remain. He receives nothing from the State, and when the family's shelter allowance is reduced, nothing is taken from him. He continues to live in the household at the pleasure of the family.

Clearly what the State is doing is not keeping welfare funds from the ineligible by this regulation.[13] Rather it seeks to punish the welfare family for using its own resources in a manner of which the Commissioner disapproves in advance in every case. Whether the Commissioner is attempting to enforce the "middle class morality" mentioned by the majority, or just trying to save money any way he can, the federal statute and regulations, and the unanimous case law forbid the State from enforcing its predilections *which are irrelevant to the*

mines to be the necessary resources, but then the resources belong to the family to utilize as it best sees fit. Absent this element of choice a welfare state would be a police state.

If the State believes that the resources are being misused to the detriment of the child, it has a vast battery of provisions which it may use to protect the child. Initially and primarily there are counseling services for the family. 18 NYCRR §§ 370.3, 3.5. This may range from simple caseworker counseling to specialized psychiatric help. Where a recipient has demonstrated an inability to handle the cash resources provided, restricted payments may be made rather than the normal unrestricted payments. Soc. Services Law § 350-a; 18 NYCRR § 381.3(a). For instance, if the head of the household wastes money so that rent payments cannot be met, the State may undertake to pay the shelter allowance directly to the landlord. Soc. Services Law § 143 b; 18 NYCRR § 387.2(c). The overall payments may be made to a person other than the head of household or to an agency on behalf of the eligible child. 18 NYCRR § 381.3. A homemaker may be provided in the home for the family. 18 NYCRR § 387.2. Intensive family casework services are available. 18 NYCRR §§ 450.3-.7. In extreme cases the children may be removed from the home and placed in foster care. Soc. Services Law § 358-a; 18 NYCRR § 423.3. And, of course, the whole gamut of procedures relating to neglected children is available to the State. Soc. Services Law §§ 374, 397, 398; Penal Law §§ 260.05, .10; Family Court Act § 1011-7a.

14 If the lodger were receiving welfare funds for which he was ineligible, he could be prosecuted for welfare fraud. Soc. Services Law § 145.

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welfare of the child[15] by depriving the eligible child of its needs. *See, e.g., Carleson* v. *Remillard*, 406 U.S. 598 (1972); *Townsend* v. *Swank*, 404 U.S. 282 (1971); *Lewis* v. *Martin*, *supra*; *King* v. *Smith*, *supra*; *Doe* v. *Ellis*, 350 F. Supp. 375 (D.S.C. 1972) (three-judge court); *Saddler* v. *Winstead*, 332 F. Supp. 130 (N.D. Miss. 1971); *Doe* v. *Schmidt*, 330 F. Supp. 159 (E.D. Wis. 1971) (three-judge court); *Doe* v. *Shapiro*, 302 F. Supp. 761 (D. Conn. 1969) (three-judge court), *appeal dismissed*, 396 U.S. 488 (1970). And that is exactly what is being done here.

To repeat, to reduce the shelter allowance of an AFDC family by virtue of the presence in the home of a non-paying lodger does not deprive the lodger of any benefits —only the family which allows him to stay can do that— but rather deprives the needy family, and especially the needy child who is the object of the AFDC program, of them.

If the State believes that the non-paying lodger should not get a "free ride," the State may legislate or proceed against the lodger, but should it be permitted to deprive *the needy child?* The State may attempt to obtain reimbursement from the lodger for the use of the family's resources,[16] but should it be able to punish the child because the head-of-household does not require the lodger to pay for his shelter? *Cf. Doe* v. *Schmidt*, *supra*; *Doe* v. *Shapiro*, *supra*.

There are only two other points made by the majority requiring passing mention. First, there is a suggestion

15 Neither the State nor the majority has asserted that the regulation in question in any way safeguards the welfare of the eligible child. Nor does it appear how by reducing the child's benefits, which in one of the cases before us resulted in a notice of eviction, the child's welfare would be enhanced.

16 The State already requires the applicant for welfare to assign certain assets and to utilize all resources for the production of income. *See* 18 NYCRR §§ 352.13(4), 352.23, 352.25, 352.27, 352.28.

that an "economy of scale" operates in the sense that the per capita housing cost decreases when there is a lodger. It is nonsense, however, to say that the cost of housing to the recipient family decreases when there is a *non-paying* lodger. Moreover, an economy of scale does not reduce the *total* cost of anything, and yet here, where the recipient family is legally and factually responsible for the total rent bill, the State is providing a *smaller* total allowance although the lodger contributes nothing. An economy of scale would operate only if the lodger were presumed to pay his pro rata share. But such a presumption would be clearly unlawful, as the majority concedes and 45 C.F.R. § 233.90(a) provides. The presence of a lodger is, finally, irrelevant to the rent the family pays. A certain rent is due and payable; if the State reduces the rent allowance, the difference will either be made up out of food budget— literally out of the needy child's mouth—or it will not be made up, resulting in a notice of eviction. Plaintiff Taylor with her eviction notice would surely laugh, although perhaps a little bitterly, at the majority's suggestion that by housing her destitute and disabled sister the family's "actual cost of housing" was reduced.

Finally, in a footnote, the majority quotes from a letter from HEW in response to questions from the State. The suggestion of the footnote is that HEW has taken a position on the question before us. To the contrary, however, in that same letter HEW acknowledged that it approves both plans like New York's and those which grant full shelter allowance despite the presence of non-recipients in the household. In other words, HEW here, just as it did prior to *King* v. *Smith*, *supra*, has not resisted a state's attempt to evade its own regulations and the federal statutes. *See also Shea* v. *Vialpando*, 12 U.S.L.W. at 4563 n. 11.

I would affirm the judgments below, because, as Judge Bauman said,

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the inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. . . . This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.

Hurley v. *Van Lare*, 365 F. Supp. 186, 195 (S.D.N.Y. 1973). Because the regulation denies the eligible child his basic needs for no reason related to the purpose of the federal statute, it violates that statute and the implementing regulations.[17]

17 The majority's decision in its own words is premised upon what the majority concludes the *New York regulations* to "imply" or to be "based on," or their "objective." The Appellate Division in *Battle* v. *Lavine*, *supra*, the highest state court to have spoken on the issue, has explicitly rejected the interpretation of the majority here. Whether this court should be bound by the interpretation of state law made by *Battle* is a question not argued or briefed to us as *Battle* was decided after argument before this court. Nevertheless, it is clear that the majority decision, based as it is on an interpretation of state law, does not preclude New York courts from reaching an opposite conclusion, as the *Battle* court did, as to the conformity of the state regulations with the federal statute and regulations.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROSE HURLEY, individually and on behalf of her minor dependent children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York,

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York,

LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

----------x

OPINION

72 Civ. 3423

APPEARANCES

Legal Aid Society of Westchester County (Martin A. Schwartz, Jerold S. Slate, Lawrence S. Kahn, of counsel) for plaintiffs and intervenor D'Alessio.

Legal Aid Bureau of Buffalo, Inc. (Michael A. O'Connor, Margaret Dodd, of counsel) for intervenor Clark.

Louis J. Lefkowitz, Attorney General, State of New York (Judith A. Gordon, Gene B. Mechanic, of counsel) for defendants Van Lare and Lavine.

John J. S. Mead, County Attorney, Westchester County (Richard W. McAtamney, of counsel) for defendant Kurtis.

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BAUMAN, D. J.

Before the court is yet another action challenging the manner in which the State of New York allocates its welfare funds. Plaintiff and her three minor children receive public assistance pursuant to the Aid to Families with Dependent Children (AFDC) program. The action is brought on their behalf, and on behalf of all others similarly situated, to enjoin the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv)[1/] and 18 N.Y.C.R.R. § 352.30(c) and (d)[2/] and to secure retroactive public assistance payments of which she claims to have been unlawfully deprived.

The plaintiff has moved for class determination pursuant to Rule 23 of the Federal Rules. She also seeks summary judgment pursuant to Rule 56, and thereby, a permanent injunction against the enforcement of the attacked state regulations as well as retroactive welfare payments. Plaintiff argues that these regulations are violative of the due process and equal protection clauses of the Fourteenth Amendment and repugnant to the rights of privacy and freedom of association secured by the First, Ninth, and Fourteenth Amendments. She also contends that they are violative of the Supremacy Clause (Article VI) in that they conflict with the provisions of subchapter IV of the Social Security Act, 42 U.S.C. § 601 et seq. and the regulations promulgated thereunder. The defendants in turn have moved to dismiss the action pursuant to Rules 12(b)1 and 12(b)6 of the Federal Rules on the grounds that this court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief can be granted. In addition, Phyllis D'Alessio and Loretta Clark, both mothers receiving

aid under the AFDC program, seek to intervene pursuant to Rule 24 (b)(2). The defendants oppose their intervention.

I.

A brief exposition of Mrs. Hurley's situation may help illumfnate the difficulty in which she and others in her purported class find themselves.[3/]

Mrs. Hurley has been living apart from her husband since 1967 and claims not to have seen or heard from him since that time. From November, 1970 through February, 1971 a male who contributed nothing toward her maintenance or that of her three children lived with her. Her rent during that period was $150 per month. Upon learning of the presence of a male lodger, the Westchester County Department of Social Services, without explanation as to how the figure was reached, deducted $35 per month for the four months from plaintiff's recurring grant.

On November 12, 1970 plaintiff requested a State Fair Hearing which was held on March 22, 1971 in White Plains, New York. In a decision rendered September 20, 1971, Barry Van Lare, the Acting Commissioner of the Department of Social Services, upheld the grant reduction but ruled that the Westchester Department should have deducted $30 rather than $35 from her stipend.[4/]

Plaintiff claims that she still wishes to associate and reside with this male friend, but is afraid to do so because of the anticipated reduction in her public assistance grant.

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II.

I shall first consider plaintiff's motion that this be designated a class action pursuant to Rule 23(a) [5] and Rule 23(b) [6] of the Federal Rules. The proposed class would consist of "all residents of the State of New York who are or were receiving public assistance, who have had their grants reduced, terminated, suspended or denied, or who are threatened with reduction, termination, suspension or denial, solely because of the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c) and (d)."

It would appear that all of the requirements in the above cited rules have been met and that this may proceed as a class action. Plaintiff's efforts to demonstrate satisfaction of the numerosity requirement, Rule 23(a)1, have been thwarted in part by the state's failure to compile any state-wide statistics on the number of recipients whose grants have been reduced because of the presence of lodgers. [7] However, the defendants did furnish statistics compiled by a research analyst in the State Department of Social Services indicating that as of November 1, 1972, there were 477 such cases in New York City. That figure alone would render the class so numerous that joinder would be impracticable, and it may reasonably be assumed that the total number in the state is far larger still.

Plaintiff's claims are typical and there can be no dispute that the questions of law or fact are common to the class. It has been frequently noted in similar cases that the state's promulgation of an unconstitutional regulation and/or its failure to comply

with regulations of the Department of Health, Education, & Welfare affects all welfare recipients in the same manner. Seritella v. Engelman, 339 F.Supp. 738 (D.N.J. 1972); Almenares v. Wyman, 334 F.Supp. 512 (S.D.N.Y. 1971), affd., 453 F.2d 1075 (2nd Cir. 1971). For the purpose of determining the constitutionality of the challenged regulations, it does not matter that plaintiff and some members of the class have received Fair Hearings and others have not. The exhaustion of state administrative remedies is not a prerequisite to the maintenance of an action under 42 U.S.C. § 1983. Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971); Carter v. Stanton, 405 U.S. 669 (1972); Damico v. California, 389 U.S. 416 (1967). Accordingly, even where some of the named plaintiffs have exhausted their administrative remedies, the class may nevertheless include others who have not. Doe v. Lavine, 347 F.Supp. 357 (S.D.N.Y. 1972); Broussard v. Schlumberger Well Services, 315 F.Supp. 506 (S.D.Tex. 1970); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969). Hence such factual distinctions among members of the class have little bearing on the resolution of the central question presented by this action, namely, the constitutionality of the New York regulations.

I have no doubt that the representative party will fairly and adequately protect the interests of the class. The Legal Aid Society of Westchester County, which represents both Mrs. Hurley and Mrs. D'Alessio, one of the intervenors, has demonstrated a high standard of advocacy in both its written and oral presentations before this court, and I am certain that it will continue to do so.

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Finally, it is also clear that the instant action is precisely of the type contemplated by Rule 23(b)2. The Advisory Committee Notes to Rule 23 with reference to this subsection point up its applicability:

> "This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class and final relief of an injunctive nature, setting the legality of the behavior with respect to the class as a whole, is appropriate... Action or inaction is directed to a class within the meaning of this subsection even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." (Citations omitted).

Examples of cases challenging state welfare laws in which class action status has been granted are legion. Almenares v. Wyman, supra; Gaddis v. Wyman, 304 F.Supp. 717 (S.D.N.Y. 1969); James v. Goldberg, 302 F.Supp. 478 (S.D.N.Y. 1969); Doe v. Shapiro, 302 F.Supp. 761 (D.Conn. 1969). The motion to designate the instant case a class action is therefore granted.

III.

I am also satisfied that this court has jurisdiction to entertain this action pursuant to 42 U.S.C. § 1983 and its jurisdictional complement, 28 U.S.C. § 1343(3). It is now well settled that jurisdiction exists under § 1343(3) only if the complaint presents a substantial constitutional question. Almenares v. Wyman, 453 F.2d 1075, 1082 (2nd Cir. 1971); Merriweather v. Burson, 439 F.2d 1092 (5th Cir. 1971). I therefore intend to review the

plaintiff's constitutional arguments. The survey shall be brief because, as shall appear more fully below, it appears that the question presented by this case can be resolved on statutory grounds alone. I therefore need consider the substantiality, but not the substance of the constitutional claims.

Plaintiff makes four separate constitutional arguments. First, she urges that the regulations, by discouraging the presence of a male lodger, exert a chilling effect on her right to free association secured by the First and Fourteenth Amendments. See generally, N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). Second, she argues that they violate her right of privacy and right to freedom from governmental intrusion into the home. Griswold v. Connecticut, 381 U.S. 479 (1965); Stanley v. Georgia, 394 U.S. 557 (1969); Eisenstadt v. Baird, 405 U.S. 438 (1972). Third, plaintiff contends that the assumption implicit in the challenged regulations that a lodger will contribute his pro rata share of shelter costs constitutes a conclusive presumption in violation of the Due Process clause of the Fourteenth Amendment. Carrington v. Rash, 380 U.S. 89 (1965); Stanley v. Illinois, 405 U.S. 645 (1972); Vlandis v. Kline, ____ U.S. ____ (June 11, 1973); United States Department of Agriculture v. Murry, ____ U.S. ____ (June 25, 1973). Her final argument is that the regulations violate the equal protection clause of the Fourteenth Amendment by discriminating arbitrarily between two classes of equally needy families: those without a lodger, who receive a full welfare stipend, and those with whom a lodger resides.

and whose stipend is accordingly reduced. See Dandridge v. Willi[illegible] 397 U.S. 471 (1970); Jefferson v. Hackney, 406 U.S. 435 (1972).

Without implying any judgment on the merits of the other three contentions,[8/] I find that at least plaintiff's due process argument raises a substantial constitutional question. The Supreme Court has long held that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." Heiner v. Donnan, 285 U.S. 312 (1932). To cite one recent example, the Court in Stanley v. Illinois, supra, found unconstitutional an Illinois law which made illegitimate children the wards of the state upon the death of their mothers and which consequently presumed unmarried fathers to be unfit to raise such children. It concluded that, as a matter of due process, an unmarried father was entitled to a hearing on his fitness as a parent before being deprived of his children. The Court observed that Illinois "insists on presuming rather than provi[illegible] Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing ...." 405 U.S. at 658.

In several recent cases courts have concluded that statutes similar to those at issue here created conclusive presumptions incapable of being contravened by a factual showing. In Boucher v. Minter, 349 F.Supp. 1240 (D.Mass. 1972), a three judge court struck down a provision of the Massachusetts AFDC program which reduced the shelter allowance to needy children upon the remarriage of their

mother. The court held, inter alia, "[t]he irrebuttable presump[illegible] underlying the defendants' policy, namely, that after the mother's remarriage the children in the AFDC family do not need a shelter allowance and that household expenses will be paid by the stepfa[illegible] is unrealistic and arbitrary." See also Jenkins v. Georges, 312 F.Supp. 289 (W.D.Pa. 1969); Owens v. Parham, 350 F.Supp. 598 (N.D. Ga. 1972); Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972).

Because 18 N.Y.CR.R. § 352.31(a)(3)(iv) and §§ 352.30(c) and (d) automatically prorate a family's shelter allowance upon t[illegible] presence of a male, I conclude that plaintiff's contention that a conclusive presumption is thereby cr[illegible]ated in violation of the Due Process Clause presents a substantial constitutional question and is a sufficient predicate for jurisdiction under 28 U.S.C. § 1343 I wish to emphasize that I do not pass on the substance of this question, both because the issue can be resolved on narrower grou[illegible] and because it would be improper for a single judge to do so. I find only that the plaintiff has adequately refuted defendants' contention that the constitutional arguments presented here are frivolous or a mere pretext for placing the statutory arguments before this court.

III.

Before turning to plaintiff's contention that the challe[illegible] New York regulations are inconsistent with regulations promulgated under the Social Security Act, two observations are in order. First, it is now established that a suit to enjoin the enforcement of a state statute on the ground of its asserted repugnancy to a

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federal statute does not require the convening of a three judge court. Swift and Company v. Wickham, 382 U.S. 112 (1965); Ex parte Buder, 271 U.S. 461 (1926); Ex parte Bransford, 310 U.S. 354 (194[illegible] Case v. Bowles, 327 U.S. 92 (1946). Second, where a court is presented with both constitutional and statutory claims, it is obliged to consider first the statutory claims. Rosado v. Wyman, 397 U.S. 397 (1970). I find myself in agreement with Judge Gurfein that "the most appropriate course for the district judge is to first face the statutory claim alone, since on it a three judge court is not required and since a three-judge court, if convened, would have to face it first." Doe v. Lavine, 347 F.Supp. 357 at 359-360 (S.D.N.Y. 1972). See also Doe v. Gillman, 347 F.Supp. 483 (N.D. Iowa 1972); Saddler v. Winstead, 327 F.Supp. 568 (N.D. Miss. 1971); Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481 (D.Conn. 1972).

The AFDC program, 42 U.S.C. § 601 et seq., is one of three major categorical public assistance programs established by the Social Security Act of 1935. Its purpose is the encouragement of "the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services" to such children. 42 U.S.C. § 601. The dependent child is defined, at 42 U.S.C. § 606(a), as one "who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent."[9/]

§ 606(a) was first carefully scrutinized by the Supreme Court in King v. Smith, 392 U.S. 309 (1968). At issue there was

an Alabama regulation denying AFDC assistance to the children of any mother (1) who lived with a man; (2) who was visited frequently by a man "for the purpose of cohabiting"; or (3) who cohabited with a man even outside her children's home. Under the Alabama scheme it was irrelevant whether the man was legally obligated to support the children, and equally irrelevant whether he did in fact make any contribution toward their support. The State of Alabama argued before the Court that its regulation simply further refined the definition of "absent parent" under § 606(a); it further contended that its regulation significally reduced the welfare caseload, discouraged sexual intercourse, and put "informal" families on the same footing as other families. The Court rejected all of these contentions. It found it "inconceivable ... that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children." It further concluded that "Congress intended the term 'parent' in ... 42 U.S.C. § 606(a) to include only those persons with a legal duty of support." The Court there struck down Alabama's regulation because it defined "parent" in a manner inconsistent with the federal statute.

The Court's exegesis of § 606(a) in King v. Smith was codified in 45 C.F.R. § 203.1.[10/] That provision defined "parent" in accordance with the Court's interpretation and further provided that in determining a child's financial eligibility, a State could consider "only such income as is actually available for current use on a regular basis." In Lewis v. Martin, 397 U.S. 552 (1970), the Court had occasion to consider these new regulations, and that decision has a readily apparent relevance for the instant case. That

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case presented a challenge to a California law providing that welfare payments to children who lived with their mother and step-father "or an adult male person assuming the role of spouse" (MARS) shall be computed after consideration is given to the income of the stepfather or MARS. The Court noted (without explicitly advocating to the Due Process Clause of the Fourteenth Amendment) that the statute conclusively presumed that a child's needs were reduced by the income available from the man in the house whether or not such income was used to meet these needs. It upheld 45 C.F.R. § 203.1 as a reasonable exercise of HEW's administrative judgment and held that "[i]n the absence of proof of actual contribution, California may not consider the child's 'resources' to include either the income of a non-adopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS whatever the nature of his obligation to support." 397 U.S. at 559-560. The Lewis case has frequently been invoked by lower federal courts to invalidate state statutes which reduce AFDC grant to reflect the support supposedly provided by a stepfather or "man in the house." Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972); Gilliard v. Craig, 331 F.Supp. 587 (W.D.N.C. 1971), affd., 409 U.S. 807 (1972); Gaither v. Sterret, 346 F.Supp. 1095 (N.D.Ind. 1972), affd. 409 U.S. 1070 (1972). See also, Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972); Solman v. Shapiro, 300 F.Supp. 409 (D.Conn. 1969), affd. 396 U.S. 5 (1969).

In the case at bar plaintiff argues that 18 N.Y.C.R.R. § 351(a)(3)(iv) and § 352.30(c) and (d) are inconsistent with 45 C.F.R. § 233.90. She claims that these statutes, by effecting a pro rata

reduction in the rental stipend because of the presence of a lodger, conclusively presume that the lodger is contributing to the family's income, whether or not he can or does make such a contribution. Indeed, the hearing examiner's decision specifically included the following finding: "The record establishes that the man residing with appellant [Mrs. Hurley] was not willing to assume responsibility for the appellant or her children of which he is not the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant." Plaintiff argues that the state statutes which effect a reduction in the rental stipend in disregard of such circumstances violate the policies enunciated in the King and Lewis decisions and embodied in 45 C.F.R. § 233.90.

Defendants, unable to distinguish those cases convincingly, offer but one argument in rebuttal. They contend that the only purpose of the challenged statutes is to prevent the allocation of AFDC funds to non-eligible persons. The regulations "merely pro rate the rent among the eligible persons and compute the shelter allowance accordingly, leaving the lodger and non eligible to pay his own way."[11/] It would be unfair, the defendants imply, to permit a male lodger, who need not have qualified for public assistance, to share in the family's rental stipend. In order to prevent state subsidy of an ineligible recipient, the argument continues, the stipend must simply be reduced by the lodger's proportionate share.

I find the defendants' argument utterly unpersuasive and hold that the challenged regulations are inconsistent with 45 C.F.R.

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§ 233.90. Despite the defendants' professed concern that ineligibles not receive a rental stipend, the inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33-1/3%. This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.

The regulations thus conflict directly with § 233.90, a portion of which states: "[u]nder this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent', or 'man in the house', or any individual other than that described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state." Despite the defendants' protestations to the contrary, a pro rata reduction does indeed assume that the male lodger will pay his own way, whether or not he actually does. That is precisely the assumption found impermissible in King and Lewis.

It should also be noted that the regulations here under scrutiny are in one sense far cruder than were those at issue in Lewis v. Martin, supra. The California statutes at least took into account the income of the stepfather or MARS in computing the stipend payable to the family. The New York regulations reduce the rental stipend regardless of the lodger's income. Hence children who could qualify for a full stipend under the California plan (i.e., if the MARS in fact had no income) would have their rental stipend reduced

under the New York scheme. The Supreme Court found the California regulations not calibrated carefully enough to consider income actually available to the child. These New York statutes, I find, are even less sensitive instruments.

This is not the first attempt by a state to reduce a shelter allowance on the theory that the cohabitation of eligibles and non-eligibles makes the state responsible for only a proportionate share of the rent. In Boucher v. Minter, noted at pages 8-9, supra, the Massachusetts statute operated similarly. The court there perceptively identified the fallacy in the reasoning of the statute:

> "Although she has become a member of her new husband's family, the mother remains the head of a family, distinct for purposes of AFDC, comprised of herself and her children and is no less logical a conduit for shelter payments for the children if they in fact remain in need. That family unit remains unchanged since the stepfather does not join it in law; and if he does not join it in fact, by economic participation in its expenses, there is no basis in law or fact for an irrebuttable presumption that the shelter needs of the children have not continued despite the remarriage."

That flaw inheres in the New York regulations as well. See also, Jenkins v. Georges, 312 F.Supp. 289 (W.D.Pa. 1969); Owens v. Parham, 350 F.Supp. 598 (N.D.Ga. 1972).

In conclusion, then, I find that 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c)(d) are inconsistent with 45 C.F.R. § 233.90 and thus violative of the Supremacy Clause of the Constitution. Accordingly, an appropriate injunction shall issue against their enforcement.

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V.

Two matters only remain for resolution. The first is the motion by Phyliss D'Alessio and Loretta Clark to intervene pursuant to Rule 24(b)2 of the Federal Rules.[12] Little would be gained by setting forth the proposed intervenors' backgrounds, for they are in all relevant details similar to that of Mrs. Hurley. Both are mothers receiving AFDC payments who have lost contact with the fathers of their children, and both have lived or are now living with men with whom they wish to reside on a permanent basis. Mrs. Clark has already received a Fair Hearing and sufferd a pro rata reduction in her stipend. Mrs. D'Alessio has merely been threatened with a reduction.

A motion under Rule 24(b)2 is addressed to the discretion of the district court, Lipsett v. United States, 37 F.R.D. 549 (S.D.N.Y. 1965), appeal dismissed, 359 F.2d 956 (2nd Cir. 1966), and we are continually reminded that the rule should be liberally construed. Peterson v. United States, 41 F.R.D. 131 (D.Minn. 1966). However, I believe that the rule should be construed in accordance with its underlying purpose, which is the prevention of a multiplic of lawsuits involving common questions of law or fact. Reich v. Web 336 F.2d 153 (9th Cir. 1964), cert. denied, 380 U.S. 915 (1965). Th purpose is already satisfied where, as here, the proposed intervenors fall within a class action designation. Consequently, the liberality with which the rule is customarily construed must give way to considerations of judicial economy and the avoidance of the confusion caused by multiple claimants. I have therefore concluded that where a suit has been designated a class action, admitting

intervenors who raise no new issues and who fall within the class merely clutters the action unnecessarily.[13] See Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137 (1944). I understand Rule 23(d) at least to suggest that to intervene in a class action, applicants must show more than mere identity of questions of fact and law. Were that provision construed otherwise, it would mean that any member of the class, ipso facto, has a right to intervene and litigate the action fully. Such a construction would render class actions just as unmanageable as some are wont to fear them.[14]

I have concluded that the proposed intervenors here have not made a showing sufficient to justify their intervention; they have done nothing more than demonstrate factual and legal claims in common with the class. There is no danger that the case will become moot as to the named plaintiff, a circumstance which has been found to justify intervention. Gaddis v. Wyman, 304 F.Supp. 713 (S.D.N.Y. 1969). Nor is there any contention that the proposed intervenors' interests will be prejudiced or impaired by inadequate representation on the part of the named plaintiff. Rolle v. New York City Housing Authority, 294 F.Supp. 574 (S.D.N.Y. 1969); Gabriel v. Standard Fruit & S.S. Co., 448 F.2d 724 (5th Cir. 1971). There was but one factor weighing in favor of their intervention. Both Mrs. Clark and Mrs. D'Alessio, because they were confronted with the imminent loss of welfare benefits, sought preliminary injunctions. Mrs. Hurley, who had formerly suffered a reduction but was now receiving her full stipend, did not. At oral argument,

however, the representative of the Attorney General's office agreed that the stipends of the proposed intervenors would not be reduced during the pendency of this motion. Their motions for preliminary injunctions were accordingly deemed withdrawn. Had the Attorney General not thus graciously acceded to this court's request, the intervention of the two additional parties would have served a legitimate need in protecting the interests of that portion of the class facing an immediate loss of benefits. In the present posture of the case, the presence of the intervenors serves no discernible purpose, and their application to intervene is accordingly denied.

VI.

In addition to injunctive relief, plaintiff has also sought an order allowing her retroactive welfare payments for the months in which her stipend was improperly reduced. The question of retroactive welfare benefits is, at the moment, an unusually delicate one for the district judges of this Circuit. In Rothstein v. Wyman, 467 F.2d 226 (2nd Cir. 1972), cert. denied, 411 U.S. 921 (1973), our Court of Appeals, following Ford Motor Co. v. Department of the Treasury of Indiana, 323 U.S. 459 (1945), held that the Eleventh Amendment foreclosed a court from directing the retroactive payment of public assistance benefits. This view has its adherents. See Westberry v. Fisher, 309 F.Supp. 12 (D.Me. 1970); Francis v. Davidson, 340 F.Supp. 351 (D.Md. 1972); Boucher v. Minter, supra, at fn. 6.

On the other hand, four different three judge courts have granted the payment of retroactive benefits, and each of those decisions was affirmed summarily by the Supreme Court. Gaddis v.

Wyman, 304 F.Supp. 717 (S.D.N.Y. 1969), affd. sub nom. Wyman v. Bowens, 397 U.S. 49 (1970); Shapiro v. Thompson, 270 F.Supp. 331 (D.Conn. 1967), affd., 394 U.S. 618 (1969); Zarate v. State Dept. of Health and Rehabilitative Services, 347 F.Supp. 1004 (S.D.Fla. 1971), affd., 407 U.S. 918 (1972); Sterrett v. Mothers and Childrens Rights Organization ____ F.Supp. ____ (N.D. Ind. 1972), affd., 409 U.S. 809 (1972). The Gaddis and Shapiro decisions antedated the Second Circuit's decision in Rothstein but the court did not regard them as binding precedents on the Eleventh Amendment question. Rather, Judge McGowan, speaking for the court, stated that the Supreme Court had not "as yet addressed itself specifically and authoritatively to this issue." Given this view of the value of the summary affirmance, it is unlikely that the decision of the Court of Appeals would have been in any way altered by the affirmances in Zarate and Sterret.

It is generally thought that a summary affirmance is a decision on the merits having precedential value. See Cincinnati, New Orleans & Texas Pacific Ry. Co. v. United States, 400 U.S. 932 (1970) (White, J., dissenting); Barton v. Sentner, 353 U.S. 963 (1957) (Burton and Clark, J.J., dissenting); United States ex rel. Fein v. Deegan, 410 F.2d 13 (2nd Cir.), cert. denied, 395 U.S. 935 (1969); Doe v. Hodgson, 344 F.Supp. 964 (S.D.N.Y. 1972), affd., 478 F.2d 537 (2nd Cir. 1973; Stern and Gressman, Supreme Court Practice 197 (4th ed. 1969). Nevertheless, the Rothstein court was obviously aware that the Eleventh Amendment defense had not been considered at length by the district courts in Gaddis and Shapiro (nor was it in Zarate or Sterrett). The court may then have concluded that,

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even though the question of retroactive benefits had technically been before the Supreme Court in those cases, the new gloss placed on the problem by the Eleventh Amendment defense had not. Of course if the import of the court's remark that the Supreme Court "has not yet come to grips" with the question be taken literally, it suggests that a summary affirmance has no precedential value whatever. See Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972).

The matter now however appears ripe for determination by the Supreme Court. In Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973) the Seventh Circuit concluded (a) that the prior Supreme Court affirmances were entitled to full precedential force; (b) that at all events, the Eleventh Amendment is no bar to the payment of retroactive benefits; and (c) that even if the Eleventh Amendment was a bar, Illinois had "constructively consented" to such actions. The Supreme Court has granted certiorari ____ U.S. ____, 41 USLW 3644 (June 12, 1973) and obviously will address the problem in the coming term.

Meanwhile, however, as a district judge I consider myself bound both by the Second Circuit's construction of the Eleventh Amendment and by its view of the precedential force of the various summary affirmances. Although suits by welfare recipients are numerous, the question of the Eleventh Amendment as a defense to the payment of retroactive benefits has been treated but rarely. I therefore regard the Rothstein decision as authoritative and accordingly deny plaintiff's motion for the payment of such benefits here.

In conclusion, plaintiff's motion that this proceed as a class action is granted. Plaintiff's motion for summary judgment is granted to the extent that an injunction shall issue permanently enjoining the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c) and (d). Plaintiff's motion is denied to the extent that it seeks an order directing the payment of retroactive welfare payments, and that portion of the complaint is dismissed. Defendant's motion to dismiss for failure to state a cause of action is denied, as is its alternative motion for summary judgment. The motions of Clark and D'Alessio to intervene are also denied.

The parties are directed to settle an order on notice providing for an appropriate form of injunctive relief.

Dated: October 3, 1973

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U. S. D. J.

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Footnotes

1/ 18 N.Y.C.R.R. § 352.31(a)(3)(iv):

"§ 352.31 Estimate of need and application of income

(a) For applicant or recipient.

• • •

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

• • •

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c)."

The reference to § 352.30(c) is erroneous; it is clear from the text of the section, set out at footnote 2, infra, that the reference should be to § 352.30(d).

2/ 18 N.Y.C.R.R. § 352.30 Persons included in the budget

"(c) When an applicant or recipient wilfully fails or refuses to comply with the requirements of Part 385 of this Title, the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro rata basis for the eligible family members only.

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance."

3/ The ensuing account is adopted from plaintiff's statement submitted pursuant to Rule 9-G of the Southern District Rules in support of her motion for summary judgment. With one unimportant exception, none of the facts in that statement is disputed by the defendants.

4/ This computation was reached in accordance with the controverted state regulations, cited at footnotes 1 and 2, which provide that if a male lodger does not contribute at least $15 per month, the family shelter allowance shall be reduced by the lodger's pro rata share. The previous shelter allowance had been $150, and thus the male lodger's pro rata share was 1/5 X $150 or $30.

5/ Rule 23(a):

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

6/ Rule 23(b)(2):

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or"

7/ See the letter of Judith A. Gordon, Assistant Attorney General, to Jerold S. Slate of the Legal Aid Society of Westchester County, appended as Exhibit C to the Slate affidavit.

8/ From his concurring opinion in United States Department of Agriculture v. Moreno, ____ U.S. ____ at ____ (June 25, 1973), it is apparent that Mr. Justice Douglas would regard the arguments based on privacy and freedom of association as substantial. In considering § 3(e) of the Food Stamp Act of 1964, 7 U.S.C. § 2012(e), which excludes from participation in the food stamp program any household

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containing an individual unrelated to any other member of that household, he observed: "[t]he right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod." The majority found the statute violative of the Due Process Clause of the Fifth Amendment and therefore did not reach these questions. See, however, the opinion of Judge McGowan for the three judge court below, Moreno v. United States Department of Agriculture, 345 F.Supp. 310 at 314 (D.D.C. 1972).

9/ 42 U.S.C. § 606(a) reads in full as follows:

> "(a) The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;"

10/ 45 C.F.R. § 203.1 is set out in substance in Lewis v. Martin, 397 U.S. 552 (1970) at p. 556. It has been succeeded by 45 C.F.R. § 233.90(a), which incorporates its predecessor with relatively few changes. § 233.90(a) reads as follows:

> "(a) State plan requirement. A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's step-parent who is ceremonially married to the child's natural or adoptive parent, and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent" or "man-in-the-house" or any individual

> other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions."

11/ Defendants' Memorandum of Law, pp. 22-23.

12/ Rule 24(b):

> "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

13/ By the same reasoning, permissive intervention is most appropria[te] where the court has determined a case unsuitable for class action treatment. Thus in Doe v. Lavine, 347 F.Supp. 357 (S.D.N.Y. 1972), Judge Curfein granted motions to intervene by eight persons while finding that factual discrepancies precluded a class action designation. Similarly, Judge Mansfield in Boone v. Wyman, 295 F.Supp. [1] (S.D.N.Y. 1969), affd., 412 F.2d 857 (2nd Cir. 1969), cert. denied, 396 U.S. 1024 (1970), permitted intervention under Rule 24(b)2 but expressed doubt as to whether the prerequisites for a class action existed.

14/ Some courts have permitted intervention in class actions by applicants raising the same issues, and retaining the same attorneys, as the named plaintiffs. Epstein v. Weiss, 50 F.R.D. 387 (E.D.La. 197[1]); Hicks v. Crown Zellerbach, 49 F.R.D. 184 (E.D.La. 1968). The underlying rationale there appears to be that in such circumstances it hardly makes any difference whether intervention is permitted or de[nied]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
U.S. DISTRICT COURT E.D.N.Y.
★ OCT 11 1973 ★
TIME A.M.
P.M.

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES H. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

MEMORANDUM AND ORDER

73-C-699

APPEARANCES:

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Mineola, New York
Vincent M. Esposito, Esq.
Of Counsel

WEINSTEIN, D.J.

15

Plaintiffs, for themselves and others similarly situated, move for summary judgment; defendants move to dismiss on the grounds of lack of jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs' motion must be granted.

Annie Taylor's rent allowance has been reduced by one-third on the presumption that her sister, who lives with her, is contributing to its payment. Charlotte Otey has had her rental allowance reduced by one-third on the presumption that her son, who lives with her, is contributing to household expenses. There is no evidence of such contributions by those adults living in plaintiffs' homes.

The ruling is said to be required by New York State Welfare Regulation 18, N.Y.C.R.R. 352.30(d) reading in part as follows:

> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be in the budget and shall be deemed to be a lodger or boarding lodger. . . .In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance." 18 NYCRR 352.30(d) (1st and 4th sentences)

This regulation, incorporating as it does a presumption of financial support having no basis in fact, is alleged to be inconsistent with the applicable federal regulation, 45 C.F.R. 233.90(a), 36 Fed. Reg. 3868, reading as follows:

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"A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the employment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contribution."

Almost identical claims were before the District Court for the Southern District of New York, Hurley v. VanLare, 72-C-3423. The Hurley case involved a non-related male sharing the home. In a full opinion dated October 3, 1973 Judge Bauman ruled that the action was properly brought on behalf of a class and that the New

York regulation was invalid because it was in conflict with federal law. See Appendix A, attached. The opinion is convincing and its reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief is adopted by this court.

The class in Hurley can be construed as including the class in the instant case. If it is not, then a fortiori the plaintiffs before us are entitled to injunctive relief since it is no more likely that a sister or a son will share in the support of a household than will an adult unrelated cohabitating male.

The issue of retroactive benefits is more difficult. As plaintiffs admit (Brief pp. 29-30), the Second Circuit, unlike other circuits, denies retroactive benefits. Judge Bauman, as I do, felt bound by the rule of this Circuit. Were it open to the court, it would adopt what it considers the fairer rule, permitting the court to order retroactive payments where the family, and particularly the children, are continuing to suffer because of the deprivation. It is well known that rents must be paid and that given a fixed allowance and a rising rent or a fixed rent and a decreasing allowance, poor families will have to reduce expenditures for such necessities as food or clothing. It may well be that in the instant case there has been, for example,

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skimping on purchases of winter clothing or blankets for the children in order to make up the one-third rental allowance deficit. This may well adversely affect their health during the coming winter when, we can judicially notice, fuel will be short in this area.

The defendants are urged to reexamine the situation of the plaintiffs to insure that there will be no adverse consequences to the children involved as a result of the failure of this court to order retroactive benefits.

Settle order on forty-eight hours notice.

So ordered.

Dated: Brooklyn, New York
October 10, 1973

U.S.D.J.

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In the Matter of the Appeal of

ROSE HURLEY

from a determination by the Westchester County Department of Social Services (hereinafter called the agency)

DECISION AFTER FAIR HEARING

A fair hearing was held at White Plains, New York, on March 22, 1971, before Edward Hubbard, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of aid to dependent children, in that the agency had deducted $35 a month from the appellant's budget for the month of November, and December, 1970, and January and February of 1971. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant and her three children are in receipt of aid to dependent children.

(2) During the month of November and December, 1970, and January and February, 1971, the agency deducted $35 a month from appellant's recurring grant because of the presence of a "lodger" in appellant's household. No explanation was offered by the agency as to the method of computation of $35 a month.

(3) Appellant's rent is $150 a month.

(4) A male friend of appellant's resided with her during the months of November and December, 1970, and January and February, 1971.

(5) No contribution was made to the appellant by the friend.

Section 352.31(3)(iv) of the Regulations of the State Department of Social Service provides that when a female recipient is living with a man to whom she is not married.....and when the man is unwilling to assume responsibility for the woman or her children and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with Section 352.30(c) of the Regulations.

Section 352.30(c) of the Regulations of the State Department of Social Services provides that in the event a lodger does not contribute at least $15 a month, the family shelter allowance including fuel for heating, shall be a prorata share from the shelter allowance.

The record establishes that the man residing with appellant was not willing to assume responsibility for the appellant or her children and there are no children of which he is the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant. Accordingly, the agency should have deducted $30 a month from the cost of shelter as his prorata share of rent.

DECISION: The determination of the agency is reversed. The agency is directed to recompute

the appellant's grant for the months involved in accordance with the foregoing and to issue a grant in the amount of the difference between what the appellant should have received, and that which she did receive. The agency is further directed to report to the Area 5 Office of the State Department of Social Services on its action taken pursuant to this decision in accordance with the provisions of Section 84.19 of the Rules of the State Board of Social Welfare.

DATED: Albany, New York

SEP 20 1971

ACTING COMMISSIONER

"A-62"

EXHIBIT "A"

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the matter of the Appeal of

ANNIE TAYLOR

from a determination by the Nassau County Department of Social Services (hereinafter called the agency)

DECISION AFTER FAIR HEARING

A fair hearing was held at Mineola, New York on March 14, 1973, before Hyman Ashe Hearing Officer, at which the appellant, and a representative of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of appellant grant of aid to dependent children insofar as same relates to the shelter portion of h budget. An opportunity to be heard having been accorded all interested parties and th evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant and her daughter are recepients of aid to dependent children.

(2) Living with them is appellant's sister who is not in receipt of public assistance and who does not contribute to the rent.

(3) The maximum rent as per filed schedules for an apartment, such as appellant's for two persons is $145 and for three persons it is $165.

(4) The agency has budgeted appellant's shelter allowance at 2/3 of $165, or $11

(5) Appellant claims that it should be budgeted at $145, the maximum for 2 pers since the third person does not contribute anything to the rent.

Pursuant to Section 352.30(d) of the Regulations of the State Department of Social Services a non-legally responsible relation in the household who is not receiving public assistance shall be deemed a lodger. In the event the lodger does not contribu at least $15 per month, the family's shelter allowance shall be pro rata share of the regular shelter allowance. Therefore, the agency's determination to allow the appella a shelter allowance in the amount of $110 was correct and in accordance with the above cited Regulation.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York

APR 20 1973

Abe Levine
COMMISSIONER

BY Carmen Shang
Carmen Shang
ASSISTANT COMMISSIONER

"A-63"

REGULATIONS OF THE DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE

45 C.F.R. §233(a)(3)(ii)(c) provides:

"§233.20 Need and amount of assistance.
(a) Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below: ---

(ii) Provide that, --- (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered---."

45 C.F.R. §233.90(a) provides:

> "A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the employment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contribution."

REGULATIONS OF THE NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES

18 N.Y.C.R.R. §352.30 provides:

352.30 Persons included in the budget. (a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household. Members of the family temporarily absent from the home shall be included as a member of the household in the budgetary estimate, such as children or minors attending school away from home, except when maintenance is provided without cost.

(b) The household of a pregnant woman shall be considered as increased by one person from the fourth month of the pregnancy which has been medically verified.

(c) When an applicant or recipient willfully fails or refuses to comply with the requirements of Part 385 of this Title the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro-rata basis for the eligible family members only.

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

Historical Note

Sec. added, filed June 2, 1970; amds: 1972 eff. immediately. Substituted new (z). filed: Sept. 1, 1970; Aug. 24, 1971; Mar. 13,

18 N.Y.C.R.R. §352.31 provides:

352.31 Estimate of need and application of income. (a) *For applicant or recipient.*

(1) The estimate of need for any applicant or recipient shall include all items of need as specified in these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of need shall be the appropriate amount provided in accordance with the schedules and other provisions of these regulations. To the extent that an item offered is otherwise provided it shall not be included in the estimate of need, but the manner in which such item is provided shall be recorded.

(2) All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, including support payments required to be made by a parent pursuant to an order of the family court or other appropriate court, shall be prorated and applied against the needs of the applicant, the spouse and the minor children of either or both. The income of a legally responsible relative in the home who has been disqualified under Part 385 of this Title shall be applied in determining eligibility and degree of need for himself as if he were a member of the family, and the family members for whom he is responsible. The amount of the grant for the eligible family members shall be provided on a pro-rata basis in accordance with section 352.30(c). Under exceptional circumstances other than disqualification under Part 385, a spouse who refuses to make application for assistance and to have his income so applied against the needs of his family, shall have his needs estimated as if he were applying for public assistance and his income applied first against his own needs and any surplus against the needs of his dependents.

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

(i) When the man is willing to be considered as a spouse, his available

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income and resources shall be applied in determining eligibility and degree of need.

(ii) When the man is willing to assume responsibility only for his needs, the needs of the woman and those children for whom he is the acknowledged or adjudicated father, his available income or resources shall be applied in determining eligibility and degree of need of such persons only; and assistance for any remaining children shall be provided on a pro rata basis.

(iii) When the man is willing to assume responsibility only for his needs, and the needs of those children for whom he is the acknowledged or adjudicated father, his available income and resources shall be applied in determining eligibility and degree of need of such persons only; and assistance for the woman and remaining children shall be provided on a pro rata basis.

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).

(v) The foregoing shall not affect the responsibility of a man to provide support for children of which he is the acknowledged or adjudicated father, nor shall it relieve the social services official from his responsibility to initiate appropriate support proceedings.

(4) Support payments required to be made by a parent pursuant to an order of the family court or other appropriate court will be treated as follows:

(i) If there has been habitual failure to make court ordered support payments or where the circumstances are such that there are reasonable grounds to believe that such support payments will not be made, the income therefrom may be considered as irregular as to amount or uncertain as to receipt and the provisions of subdivision (c) of this section shall be considered as applicable.

(ii) Failure to make at least three payments in full during the preceding three month period shall be deemed to constitute an habitual failure to make payments.

(iii) The following shall constitute reasonable grounds to believe that court ordered support payments will not be made by the parent who has been ordered to make such payments:

(a) the parent has failed to make at least three consecutive court ordered support payments in full; or

(b) the whereabouts of the parent are unknown; or

(c) the parent is known to be unemployed; or

(d) the parent is confined to a medical institution or is obviously too ill or incapacitated to work; or

(e) the parent is incarcerated in a penal institution.

(iv) In cases in which the parent is making payments on a regularly recurring basis, but in an amount less than the amount stated in the court order, such lesser amount only shall be applied against the needs of the applicants or recipients in determining the amount of the grant.

(b) *Claimants for income tax exemption.* Whenever a person related by blood or marriage is claiming an applicant or recipient as a dependent for income tax purposes, his income tax statement shall be accepted as evidence that he is contributing more than 50 percent of the dependent person's support and a contribution of not less than 51 percent of the dependent person's needs shall be budgeted as available income. However,

(1) When the legally responsible relative's contribution is determined to be less than 51 percent but equal to or in excess of the agency's estimate of his ability to contribute, the actual contribution should be budgeted.

(2) When the relative is not legally responsible and refuses to contribute the 51 percent the agency shall adjust the budget in accordance with the amount actually contributed.

(c) *Irregular or uncertain income.* When income is irregular as to amount or uncertain as to receipt, or where granting of a budget deficit is not practicable, income may be applied as a refund and full needs met. However, an estimate of such income shall be made and applied against estimated needs for purposes of determining eligibility.

(d) *Adjustment of excess grants.* When a grant has not been reduced in a month where there is an increase in income or a decrease in need, an adjustment may be made to offset the excess in either or both of the two months following the month in which the excess was discovered, provided such excess is available to the recipient at the time the adjustment is made.

Historical Note

Sec. added, filed June 2, 1970; amds. 1972; Apr. 2 1973 eff. Apr. 2, 1973. Changed eff. Sept. 1, 1969; Aug. 31, 1971; Mar. 31, "subdivision" to "Subd.(d)" in (e)(2)(iv).